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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 839

MILMAR ESTATE, INC., WILLIAM MILLER, AL BIERMAN and AL KEVELSON,
Petitioners,

vs.

SAMUEL MARCUS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

SAMUEL MARCUS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review an order, entered in the above-entitled cause on December 26, 1957 (R. Pr. Ct. App.;* Appendix B, *infra*, p. 80), by the United States Court of Appeals for the Third Circuit, in which that Court entertained and in terms "de-

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* References herein to the certified Transcript of Record are as follows: (1) The Appendix to Appellant's Brief in the Court of Appeals (five volumes, bound in white covers) is cited as "R....a." etc. (2) The Appendix to Briefs for Appellees in the Court of Appeals (one volume, bound in blue cover) is cited as "R....b," etc. (3) The proceedings in the Court of Appeals (not paginated in the Certified Transcript) are cited as "R. Pr. Ct. App." (4) The "Motion by Appellees for Amendment of Mandate, Etc.," and the Appendix thereto, which are part of the proceedings in the Court of Appeals, and of which nine additional copies are filed herewith, are cited, respectively, as "R. Mot. Ct. App. ....." and "R. Mot. Ct. App., Appendix, ..."

nied" a motion filed December 2, 1957, by the petitioners (R. Mot. Ct. App.) praying the Court to declare the intent of, and to recall and amend, its mandate of July 31, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, pp. 65-66) (issued upon a judgment of July 3, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 64)) in this cause.

Opinions Below.

The Court of Appeals set forth a clarification or construction of the mandate in the order of December 26, 1957 (R. Pr. Ct. App.). A copy of that order is printed in Appendix B hereto, *infra*, p. 80. The opinion of the Court of Appeals filed July 3, 1957 (R. Pr. Ct. App.), and the opinion of the District Court filed March 12, 1956 (R. 111a to R. 139a), rendered, respectively, in connection with the appellate and trial judgments in this cause, are reported, respectively, in 246 F. 2d 200 and 140 F. Supp. 66, and are printed in Appendix B hereto, *infra*, pp. 25, 58.

Jurisdiction.

The date of entry of the order of the Court of Appeals sought to be reviewed is December 26, 1957 (R. Pr. Ct. App.; Appendix B, *nifra*, p. 80). The prior judgment of the Court of Appeals, entered July 3, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 64), may possibly be deemed brought forward for review on the present petition. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. § 1254 (1).

Questions Presented.

1. Whether nearly six years of arduously contested litigation which decided on grounds of credibility all of the substantive issues on the merits, in a complex dispute over ownership of corporate stock of great value, should be wiped out, merely because the interpleader complaint is held to have been jurisdictionally improper, where the adjudication is sustainable on post-complaint independent jurisdictional grounds.

2. Whether the Court of Appeals, in the manner in which it has phrased its successive rulings, has so kept the question of dismissal of the post-interpleader claims in a state of ambiguity and uncertainty, and has consequently so disadvantaged petitioners in their rights, including especially their right to seek timely review in this Court, as to justify the conclusion that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings" that this Court should grant review.

3. Whether the order of December 26, 1957 (on our motion addressed to the mandate) ruling that the District Court's adjudication of all of the issues must fall with the dismissal of the interpleader complaint, worked a jurisdictional ouster of the post-interpleader claims for the first time in the case; or whether such ouster was effected with requisite certainty and reviewable finality by the judgment of July 3, 1957.

4. Whether the post-interpleader claims rest upon federal jurisdiction independent of the interpleader complaint.

5. Whether, if the judgment of the Court of Appeals of July 3, 1957, be deemed properly brought forward for review, it erroneously dismissed the interpleader complaint.

Statutes Involved.

The statutory provisions involved are Sections 1332 (a) (1) (62 Stat. 930; 70 Stat. 658), 1335 (62 Stat. 931), 1391 (62 Stat. 935), 1397 (62 Stat. 936), 1406 (b) (62 Stat. 937; 63 Stat. 101), 1653 (62 Stat. 944). 1655 (*ibid*), and 2201 (62 Stat. 964; 63 Stat. 105; 68 Stat. 890), of Title 28, U. S. C.; they are printed in Appendix A, *infra*, pp. 21-24.

Statement.

This action commenced in the District Court for the District of New Jersey as a suit in strict interpleader by petitioners Miller and Bierman against respondent Marcus and petitioner Milmar Estate, Inc. (R. 10a). The interpleader suit arose out of a contract executed September 14, 1948, for the sale of the stock of the interpleader-defendant Milmar Estate, Inc., which at the time owned the realty premises of "Bill Miller's Riviera," a nightclub at Fort Lee, New Jersey (Appendix B, *infra*, pp. 46, 53). The interpleader plaintiffs, petitioners Bierman and Miller, were the purchasers (*Id.*, p. 46). Their suit alleged that the named "seller" of the stock was interpleader defendant Milmar, but that interpleader defendant Marcus claimed the balance of the purchase moneys still owing (then amounting to $35,000), that Milmar "may claim" such moneys, and that the interpleader plaintiffs were pure stakeholders (R10a-13a). By post-interpleader receivership proceedings, counterclaims and crossclaims, interpleader-defendant

Marcus tried to obtain expanded relief beyond possession of the interpleaded fund; and the interpleader plaintiffs, as well as the other petitioners herein, thereupon responded with post-interpleader claims for affirmative relief against Marcus embracing all of the enlarged issues which he had imported into the case (R. 24a-111a, 114a-116a, 19b-30b, 52b-74b). The post-interpleader issues turned upon the following enlarged claims by Marcus (R. 24a-41a, 19b-30b, 52b-74b): (1) no valid sale occurred and he still owned all of the stock; (2) if a valid sale occurred it involved only approximately one-half of the stock, approximately one-half being still Marcus' property; or (3) the contract was rescissible for fraud; as a final alternative, Marcus prayed to be awarded the interpleaded fund (plus payment on Miller's personal debt (R. 36a, 48a)); Marcus also claimed that Milmar owed him money for alleged loans (R. 39a-40a). The case, tried without a jury (R. 120a), terminated, under the District Court's judgment (R. 2022a; Appendix B, *infra*, p. 54), in a rejection of all of Marcus' expanded claims and an adjudication thereon in favor of the present petitioners, except as to a claim for payment of a personal debt of Miller's which was uncontested (R. 36a, 48a). Thus, all of the post-interpleader enlarged issues which were disputed were decided in petitioners' favor. As to the interpleader issues, the District Court made award to Marcus of the interpleaded fund. The rejection of Marcus' enlarged claims was on the ground that they were utterly spurious; the District Court was confronted throughout with indications that Marcus was unworthy of belief (Appendix B, *infra*, pp. 34-35, 46-52).

The interpleader jurisdiction was based on 28 U. S. C. 1335 (R. 10a). The citizenship alignment was: plaintiff

Bierman—*North Carolina*, plaintiff Miller—*New Jersey*, defendant Marcus—*New York*, defendant Milmar—*New Jersey* (R. 10a). The District Court sustained the jurisdiction in all respects. There was no question as to jurisdictional amount (R. 10a). Diversity of citizenship was not contested in the District Court, but the question was raised *sua sponte* by that Court and was resolved in favor of jurisdiction (Appendix B, *infra*, pp. 30-33, 54; R. 117a-119a, 2022a). There was no question as to jurisdiction over the person of defendant Milmar (a New Jersey corporation, R. 10a), or of defendant Marcus (R. Mot. Ct. App., pp. 26-31). There was no question as to venue in view of 28 U. S. C. § 1397, one claimant (Milmar) being a New Jersey citizen (R. 10a), and no party having objected to the venue (see 28 U. S. C. § 1406 (b)). As to the jurisdictional propriety of the resort to the interpleader remedy, the District Court found (Appendix B, *infra*, pp. 33, 54; R. 119a, 2022a) that even though Marcus, not Milmar, was the actual "seller" in the September 1948 contract, still, since Milmar was the named "seller", the interpleader plaintiffs were in fact actuated by good faith fears that Milmar "may claim" within the meaning of 28 U. S. C. 1335; and that the interpleader suit was brought in "good faith and for good cause".[1]

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[1] The proofs on the "good faith" issue were: During 1949 and 1950, in negotiations to obtain from Marcus' wife a release of dower rights relating to the September 1948 transaction (R. 360a-366a, 555a-557a, 1528a-1534a), the 1948 purchasers sought the advice of new attorneys. This led to a scrutiny of the entire corporate structure of Milmar and the Riviera Nightclub and an examination of the documents relating to the transaction of September 1948. The result was a recommendation that it was advisable to seek an adjudication for the financial security of the 1948 purchasers. The dangers envisaged arose from the possibility that Milmar-Riviera might change hands through action of creditors, receivership or in some other manner, and that the persons who might obtain

The jurisdictional basis and impact of the post-interpleader claims are fully described in our printed motion in the Court of Appeals addressed to the mandate (nine additional copies of which are filed herewith). See R. Mot. Ct. App., pp. 10-12, 16-38. We there show (and it is apparently undisputed) that the entire District Court adjudication of the post-interpleader enlarged issues is sustainable on a perfect jurisdictional footing independent of the interpleader jurisdiction.

Marcus' appeal (R. 2027a) raised all of the substantive issues, and assailed the District Court's jurisdiction on two grounds: (1) the interpleader-plaintiffs' alleged lack of a good-faith fear of claims by both interpleader defendants; and (2) alleged lack of diversity of citizenship in the interpleader suit (Appellant's Br. 24-33). The Court of Appeals rendered its opinion and entered judgment on July 3, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, pp. 58, 64). It made the dispositive (and sole) issue the District Court's juris-

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future control in such manner might demand of Miller and Bierman that they make payment to Milmar of the purchase moneys under the September 1948 contract in accordance with its literal terms, i.e., Milmar having been named therein as the "seller." Riviera's own distressed financial history (Appendix B, *infra*, p 37), dictated that consideration be given to such possibilities. The Septemberr 1948 contract had included escrow and default provisions (id., p. 53, pars. 5, 6, 10), which in the event of distress would have opened up the situation to unpredictably unsettling possibilities. Bierman, Miller's co-purchaser in September 1948, had suffered a heart attack early in the latter month from which he had not fully recovered, thereby importing the additional unknown quantity of what might happen if the Bierman interest were to pass into the hands of an executor or administrator (R. 519a). There was express testimony for the interpleader plaintiffs that considerations along the above lines propounded to them by their new attorneys persuaded them of the necessity of filing the interpleader suit in December 1950 (R. 579a-582a, 332b-345b). During 1954, receivership proceedings were actually instituted in the Superior Court of New Jersey by Riviera creditors against both Riviera and Milmar (R. 125b-126b).

diction of the interpleader suit (*ibid*). It did not reach the diversity issue. It held that the interpleader jurisdiction had been improperly invoked in that the interpleader-plaintiffs did not have a good faith fear of adverse claims by the interpleader-defendants, Milmar and Marcus, because the plaintiffs had stock-control over Milmar (*ibid*). It did not refer to the District Court's express finding that such good faith existed, nor did it adduce any record facts inconsistent with that finding; the only facts in the record pertinent to this question support the District Court's finding (fn. 1, *supra*). The Court of Appeals also concluded that the assertedly improper resort by the interpleader-plaintiffs to the federal interpleader jurisdiction was motivated by their desire to obtain adjudication of controversies between themselves and Marcus which went beyond the issues presented by the case of strict interpleader (R. Pr. Ct. App.; Appendix B, *infra*, pp. 58-63). The Court cited nothing (nor is there anything) in the record to indicate that the interpleader plaintiffs or any of the present petitioners contemplated enlargement of the interpleader issues prior to the time when Marcus first began to seek such enlargement—which occurred in deposition proceedings commencing in 1952 (R. 1909a-1939a, 301b-332b), and was formalized by Marcus in his receivership proceeding (a full year before the joining of issue on the interpleader complaint (R. 19b-30b, 52b-74b)).[2] The Court of Appeals' judgment and opinion decreed dismissal of the interpleader complaint and vacating of the

[2] The proofs of this are overwhelming, and the record is devoid of any shred of proof to the contrary. (R. 223a-231a, 250a-251a, 288a, 302a, 326a, 340a, 358a-359a, 363a, 366a, 421a, 558a, 675a, 762a-764a, 1066a-1067a, 1307a-1308a, 1534a-1535a, 1539a). See also R. 132a-133a, Appendix B, *infra*, pp. 46-47.

District Court's judgment (R. Pr. Ct. App.; Appendix B, *infra*, pp. 58-64), but were wholly silent as to the disposition of the post-interpleader claims.

With the issuance of the mandate of the Court of Appeals (July 31, 1957) (R. Pr. Ct. App.; Appendix B, *infra*, p. 65), the impression became fortified that the Court of Appeals had not intended to effect a jurisdictional ouster of the post-interpleader claims. The opening recital paragraph of the mandate described the District Court's "judgment" (which was to be "vacated") in language referrable only to the purely interpleader issues as such (R. Pr. Ct. App.; Appendix B, *infra*, p. 65).

Upon the issuance of the mandate, petitioners, having promptly made inquiry at the District Court as to a date upon which further proceedings might be had, were advised, during the first week of August, 1957, that the District Judge assigned to the case (Judge Modarelli) was on vacation and that the parties would later be advised of a date for proceedings pursuant to the mandate (R. Mot. Ct. App. p. 9). Shortly thereafter occurred Judge Modarelli's last illness; he died before setting a date for further proceedings (*ibid*). The matter was reassigned, to District Judge William F. Smith, before whom the parties appeared on October 28, 1957 (*ibid*) upon the return of a motion by Marcus for judgment pursuant to the mandate (R. Mot. Ct. App., Appendix pp. A-1 to A-6). The petitioners urged that the post-interpleader claims rested on independent jurisdiction, and that the mandate did not require dismissal of any part of the case which rested on such independent jurisdiction and was severable from the purely interpleader issues as such (*id.*, pp. A-7 to A-19). After hearing, Judge

Smith ordered the proceedings adjourned "without day" (*id.*, p. A-12) on the ground that the petitioners "may" and "ought" to "petition the Court of Appeals for a clarification of the opinion and the mandate" (*id.*, pp. A-10 to A-19) (see also Appendix B, *infra*, pp. 67-69).

On December 2, 1957, petitioners filed their motion to obtain a determination as to whether the Court of Appeals intended to require jurisdictional ouster of the post-interpleader claims (R. Pr. Ct. App.; R. Mot. Ct. App.).

On December 26, 1957, the Court of Appeals entered an "Order denying motion for recalling and amending of mandate" (R. Pr. Ct. App.; Appendix B, *infra*, p. 80). The present petition to this Court followed (and seeks review of) the order of December 26, 1957.

Reasons for Granting the Writ.

I.

If this case be deemed properly presented here in point of finality and timeliness—a question which we defer for the present (see "VI," p. 18, *infra*)—it calls for review by this Court because the Court of Appeals has made a ruling whose effect is to oust jurisdiction of jurisdictionally unexceptionable claims or suits typifying an important instance of federal jurisdiction which has been expressly accepted in principle by five other Courts of Appeals or Circuit Courts of Appeals, by several District Courts and by leading scholarly authorities; and which has never been disapproved or repudiated, so far as we know, by any court or other authority. The principle of federal jurisdiction to which we refer is that the dismissal of a suit

for lack of federal jurisdiction does not carry with it the dismissal of counterclaims or crossclaims, if an independent basis of federal jurisdiction for such claims exists. Directly in point are: *Haberman* v. *Equitable Life Assurance Society of U. S.*, 224 F. 2d 401, 409 (C. A. 5, 1955), reh. den. 225 F. 2d 837, cert. den. 350 U. S. 948; *Isenberg* v. *Biddle*, 125 F. 2d 741, 743-744 (App. D. C. 1941); *Lion Mfg. Corporation* v. *Chicago Flexible Shaft Co.*, 106 F. 2d 930, 933 (C. C. A. 7, 1939); *Vidal* v. *South American Securities Co.*, 276 Fed. 855, 874-875 (C. C. A. 2, 1921, 1922); *Pierce* v. *Perlite Aggregates*, 110 F. Supp. 684, 687-688 (N. D. Calif. 1952), aff'd 226 F. 2d 204 (C. A. 9, 1955); *U. S. Industrial Chemicals* v. *Carbide & Carbon C. Corp.*, 52 F. Supp. 164, 166-167 (S. D. N. Y. 1943); 3 *Moore's Fed. Prac.* (Second Ed.), § 13.36, p. 98, at n. 4a; *Shulman and Jaegerman*, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 413-414 (1936).

In order "to confine inferior courts to the exercise of their prescribed jurisdiction or *to compel them to exercise their authority when it is their duty to do so*" (*U. S. Alkali Ass'n* v. *United States*, 325 U. S. 196, 202) (emphasis supplied), this Court has traditionally exercised its power of review, even to the extent of issuing the extraordinary common law writs authorized by 28 U. S. C. § 1651. E. g., *De Beers Mines* v. *United States*, 325 U. S. 212; *House* v. *Mayo*, 324 U. S. 42; *In re 620 Church St. Corp.*, 299 U. S. 24; *McClellan* v. *Carland*, 217 U. S. 268; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277.

II.

A further reason why this Court should grant review to correct the jurisdictional effect of the ruling below is that by that ruling the Court of Appeals has decided, at least impliedly so far as principle is concerned, and unequivocally so far as decisional impact is concerned, an important question of federal law which has not been, but should be, settled by this Court. The rule applied in the *Haberman, Isenberg* and other cases cited at p. 11, *supra*, to the effect that juirsdictional dismissal of a suit does not work dismissal of counterclaims or crossclaims resting on independent federal jurisdiction, has not been passed upon by this Court except insofar as it may have received attention *in camera* upon the denial of certiorari in the *Haberman* case, p. 11, *supra* (see 350 U. S. 948).

III.

The Court of Appeals' rejection of the unassailable post-interpleader jurisdiction herein touches, in further ways, interests of general and major importance beyond this case. The record does not suggest that the jurisdictional ouster of the post-interpleader claims resulted from the kind of judicial scrutiny required by decisions like *Wetmore* v. *Rymer*, 169 U. S. 115, 128 ("* * * a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion * * *."). The record here suggests rather that down to the time of its July 3,

1957 opinion and judgment (R. Pr. Ct. App.; Appendix B, *infra*, pp. 58, 64) and its July 31, 1957 mandate (R. Pr. Ct. App.; Appendix B, *infra*, p. 65), the Court of Appeals had not yet so maturely or articulately concluded to oust the post-interpleader claims as to manifest in any way in any of its rulings that it deemed "the facts * * * on the record [to] create a legal certainty of that conclusion" (*Wetmore* v. *Rymer, supra*); in fact, there is no indication of any kind that this jurisdictional question had been discerned by the Court of Appeals at all down to that juncture. Nor, even in its order of December 26, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 80), purporting to "deny" our motion addressed to the mandate, did the Court of Appeals address itself to the question of the post-interpleader jurisdiction on the merits of that question as such, stating rather merely that the latter jurisdiction in effect fell with the interpleader jurisdiction. Our motion (R. Mot. Ct. App., pp. 5-6, 40) had expressly, but unavailingly, urged the Court of Appeals to conduct, or to direct the District Court to conduct[3] a proper factual inquiry as to the jurisdictional adequacy of the post-interpleader claims and as to their severability, for judgment-preservation purposes, from the interpleader suit. The District Court never had to reach those problems before rendering judgment because, as seen, it upheld the original interpleader jurisdiction (R. 117a-119a; Appendix B, *infra*, pp. 30-33). The Court of Appeals has apparently preferred to leave those problems unreached.

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[3] Cf. *Gibbs* v. *Buck*, 307 U. S. 66, 71-72 ("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.").

Indisputably, the original opinion and judgment of the Court of Appeals herein (July 3, 1957—R. Pr. Ct. App.; Appendix B, *infra*, pp. 58, 64), and its mandate (July 31, 1957—R. Pr. Ct. App.; Appendix B, *infra*, p. 65), were wholly silent as to dismissal of the post-interpleader claims. Even the order below entered December 26, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 80) "denying" our motion addressed to the mandate (R. Mot. Ct. App.) still fails to decree dismissal of the post-interpleader claims, but instead calls for a wiping out of the entire District Court adjudication. The consequences of these continuingly uncertain rulings of the Court of Appeals are extraordinarily aggrieving. A judgment (that of July 3, 1957) of which the only "certain"[4] thing that can be said, in relation to the post-interpleader claims, is that it was *uncertain*, and which became even more uncertain in that respect when it was embodied in a formal mandate (July 31, 1957; App. p. 65, *infra*), could scarcely have served as a realistic basis for a petition for certiorari in this Court by these petitioners on the issue which has come to constitute, through no design or fault of the petitioners, the real meat of this litigation, namely, the issue of preservation of the District Court's adjudication of Marcus' enlarged demands under the post-interpleader claims. By reason of the uncertainty in the respects mentioned, and the consequent unripeness-for-review, of the July 3, 1957 judgment, petitioners were placed in the dilemma of (1) never-

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[4] "A decree, to be operative, must contain sufficient certainty in itself; it cannot be aided by presumption." *Watts* v. *Waddle*, 6 Pet. 389, 399. See also *Peirsoll* v. *Elliott*, 6 Pet. 95, 100; *Waialua Agr. Co.* v. *Maneja*, 178 F. 2d 603, 606 (C. A. 9, 1949); *Whitaker* v. *Bramson*, 29 Fed. Cas. 947, 953 (No. 17,526) (C. C. S. D., N. Y., undated); Freeman on Judgments (5th Ed., 1925), Vol. 1, § 72, pp. 126-127.

theless forging ahead with an immediate petition for certiorari which would present with "certainty" and with "certain" reviewable finality only an issue of interpleader jurisdiction (the "good-faith" issue—pp. 6-7, *supra*) that is basically factual rather than legal and would therefore in itself have had less prospect of winning this Court's interested attention than would the then still-unripe issue of ouster of the post-interpleader claims; or (2) of awaiting a clarification either in the remand proceedings in the District Court or on motion in the Court of Appeals, i. e., a clarification resulting in a requisitely certain and reviewably final adjudication as to the far more significant issue of the jurisdictional ouster of the post-interpleader claims. We tried to resolve our dilemma by choosing the second of the above two courses; and it is not yet wholly clear even now that the Court of Appeals has given us the requisitely certain and reviewably final order that we need in order to seek in this Court a review of the jurisdictional vitiation of the post-interpleader claims. The Court of Appeals' apparent unwillingness to assist us in bringing the case to a surer haven of reviewable finality and decretal certainty is not only occurring in the face of the fact that the Court itself imported the uncertainty element into the situation. The Court of Appeals' unwillingness to alleviate the situation is occurring also in the face of the fact that we are blamelessly under disadvantage arising from the lapse of time brought about by the fortuitous time sequence of the July 3, 1957 judgment, Judge Modarelli's vacation, illness and death, and the 90 day requirement of 28 U. S. C. § 2101 (c). In our motion addressed to the mandate we expressly entreated the Court of Appeals to relieve us from the danger of being untimely

before this Court (R. Mot. Ct. App., pp. 5-6, 40); the reply to our entreaty was the order of December 26, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 80), which could hardly have been more effective in keeping our dilemma unresolved.

IV.

Another interest of major and general importance which this case affects is the policy interest in preserving jurisdiction wherever possible after a case has proceeded to final decree. E.g., *Evers* v. *Watson*, 156 U. S. 527, 533; *Gaines* v. *Rugg*, 148 U. S. 228, 241. Cf. *Washington Bridge Co.* v. *Stewart*, 3 Howard 413, 423-426; *Skillern* v. *May*, 6 Cranch 267; *Kerrigan's Estate* v. *Joseph E. Seagram & Sons*, 199 F. 2d 694, 696-7 (C. A. 3, 1952).

If a jurisdictionally proper way can be found to avoid a retrial of this protean litigation, the interests of sound judicial administration and general public policy (not to say sheer humaneness) would be well served. Cf. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 93.

V.

The foregoing four reasons for granting the writ condense, additionally, into a fifth reason, namely, that the Court of Appeals has so kept the question of dismissal of the post-interpleader claims in a state of ambiguity and uncertainty, and has so disadvantaged petitioners in regard to their exercise of the right to seek timely review in this Court, as to justify the conclusion that the Court of Appeals has so far departed from the accepted and usual

course of judicial proceedings that this Court should grant review. This Court is free to interpret and to apply, in the interests of justice, the mandate of the Court of Appeals in such manner as may eliminate its stymying effects. Cf. *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 141; *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304, 310 (dissenting op.). Specifically, we urge the Court to interpret the mandate (and the opinion and judgment of July 3, 1957) as having failed to settle with certainty the question of dismissal of the post-interpleader claims; to interpret the order of December 26, 1957, as having settled that question, for the first time in the case, with reviewable finality; to decline to accept the implication apparently intended by the Court of Appeals in its latter order to the effect that it was doing nothing that had not already been done by its former judgment of July 3, 1957; and to entertain and grant this petition as a timely petition addressed to the order of December 26, 1957. The interpretation which we ask this Court to make as to the July 3, 1957, opinion and judgment and as to the July 31, 1957 mandate would be a justifiable application of the rule that an appellate judgment of reversal is not necessarily an adjudication of any questions other than those in terms discussed and decided. *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553-554; *United States* v. *Gutzler*, 105 F. 2d 188, 191-192 (C. C. A. 9, 1939). The interpretation we ask as to the order of December 26, 1957, is justified by the facts and would render it reviewable as having "modified" or "amended" the judgment of July 3, 1957 in "a matter of substance." 21 A. L. R. 2d 285, et seq.

VI.

What of the timeliness of this petition? To put the question of the timeliness of the present petition (in seeking review of the order of December 26, 1957), is but another way of putting the question of the certainty *versus* the uncertainty of the judgment of July 3, 1957. Fundamentally, then, the answer to the question of timeliness is given in all that we have said heretofore concerning the uncertainty of the July 3 judgment. In addition:

(1) No difficulty is presented by the timing of our motion in the Court of Appeals addressed to the mandate (R. Mot. Ct. App.). While the motion was filed after expiration of the time for rehearing in that Court, the Court did entertain the motion (cf. *Bowman* v. *Loperana*, 311 U. S. 262, 266; Stern and Gressman, *Supreme Court Practice* (2nd Ed.), p. 164).

(2) This Court granted certiorari in *National Biscuit Co.* v. *Kellogg Co.*, 96 F. 2d 873 (C. C. A. 3, 1938), cert. granted 304 U. S. 586, reversed on the merits 305 U. S. 111 (earlier op. 91 F. 2d 150, cert. and reh. den. 302 U. S. 654, 733, 777), in circumstances closely suggestive of those here presented, i. e., the writ was granted to review an opinion and order of the Circuit Court of Appeals which stated that clarification of the mandate was unnecessary but would be given; and while the latter Court in terms amended its judgment, it is perfectly clear from the two opinions of that Court, *supra*, and from the Transcript of Record in this Court (Oct. Term 1938 No's. 20, 56, R. III-A, pp. 2244-2303), that, unlike the situation in the instant case (which indeed stands *a fortiori* in this respect), the amendment

made no actual change in the judgment as it had been originally intended to operate. Cf. also the granting of certiorari, despite failure to move for timely amendment of the mandate, in *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304, cert. granted 333 U. S. 836. Cf. also the entertaining of mandamus in *Ex Parte Morgan*, 114 U. S. 174.

(3) It is not uncommon for courts to say that they are denying a motion addressed to a mandate and nevertheless to go on and construe or clarify the mandate; or, indeed, to grant such a motion while at the same time stating that it is unnecessary because the mandate is clear. E. g., *F. A. R. Liquidating Corp.* v. *Brownell*, 223 F. 2d 128 (C. A. 3, 1955); *S. S. Kresge Co.* v. *Winget Kickernick Co.*, 102 F. 2d 740 (C. C. A. 8, 1939), cert. den. 308 U. S. 557; *National Biscuit Co.* v. *Kellogg Co.*, 96 F. 2d 873 (C. C. A. 3, 1938), rev'd on the merits 305 U. S. 111. What the Court of Appeals has done in the instant case is to say that it is "denying" the motion while at the same time taking affirmative action thereon by clarifying the mandate in vital respects as to which it was not previously clear or certain. The right of a party to seek review in this Court should not be frustrated by technicalities evolved from the niceties of the motion procedure in this branch of appellate practice. If the fair substance of the matter is looked to, the present case will be seen plainly to involve a reviewable order upon the motion addressed to the mandate.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted. If the writ is denied and the reason for denial should be that the Court deems the

petition premature by reason of continuing uncertainty with respect to the ouster of the post-interpleader jurisdiction under the orders and judgments below, we pray that the Court shall make its order of denial without prejudice to our right to renew the petition upon the completion of further proceedings below. If the writ is denied and the reason for denial is that the Court deems the petition filed too late, we pray that the order of denial shall be without prejudice to our right to petition for leave to file common law writs of certiorari or mandamus or both pursuant to 28 U. S. C. 1651.

Respectfully submitted,

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APPENDICES.

Appendix A—Statutes Involved.

U. S. C. Title 28, Section 1332.

1332. Diversity of Citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3000.00 exclusive of interest and costs, and is between:

(1) Citizens of different States:

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. As amended July 26, 1956, c. 740, 70 Stat. 658.

U. S. C. Title 28, Section 1335.

1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instruments, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1958, c. 646, 62 Stat. 931.

U. S. C. Title 28, Section 1391.

1391. Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district. June 25, 1948, c. 646, 62 Stat. 935.

Appendix A—Statutes Involved.

U. S. C. Title 28, Section 1397.

1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936.

U. S. C. Title 28, Section 1406.

1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue. June 25, 1948, c. 646, § 1, 62 Stat. 937; May 24, 1949, c. 139, § 81, 63 Stat. 101.

U. S. C. Title 28, Section 1653.

1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts. June 25, 1948, c. 646, 62 Stat. 944.

U. S. C. Title 28, Section 1655.

1655. Lien enforcement; absent defendants

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just. June 25, 1948, c. 646, 62 Stat. 944.

U. S. C. Title 28, Section 2201.

2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended Aug. 28, 1954, c. 1033, 68 Stat. 890.

Appendix B—Opinions, Judgments, Mandate and Orders Below.

1. Opinion of District Court (March 12, 1956) (140 F. Supp. 66) (R. 111a-139a).

Appearances:

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Attorneys for Plaintiffs
By: ABRAHAM CHAZIN, ESQ., and
THEODORE CHAZIN, ESQ.

MAURICE C. BRIGADIER, ESQ., and
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ROBERT D. GROSMAN, ESQ., and
JULES E. TEPPER, ESQ.
Attorneys for Defendant Samuel Marcus

GEORGE KESSELHAUT, ESQ.
Attorney for Al Kevelson

MODARELLI, District Judge.

This is an interpleader action filed on December 28, 1950, by Al Bierman and William Miller against Samuel Marcus and Milmar Estate, Inc.[1] In order to understand the full significance of the matters in dispute in this case, I feel it necessary to make a synopsis of the pleadings in narrative form.

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[1] The action is based on 28 U. S. C. A. § 1335, which provides for interpleader if "Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim * * *" to be entitled to the money in the possession of the plaintiff. Section 1332 confers original jurisdiction upon the federal district courts in all civil actions "* * * between: (1) Citizens of different States:" Plaintiffs allege that Bierman is a citizen and resident of North Carolina; Miller of New Jersey; Marcus of New York; and Milmar of New Jersey. The jurisdiction of this court will be discussed.

Appendix B—Opinion of District Court.

THE COMPLAINT.

The complaint alleges that on September 14, 1948,[2] Milmar contracted to sell to Bierman and Miller all of its authorized and issued stock, consisting of 1,250 shares of common stock.[3] The purchase price was $125,000.00, payable $30,000.00 cash on September 14, 1948, and $95,000.00 in deferred payments: $3,000.00 each month certain premises at Fort Lee, New Jersey, were open for business, and $1,500.00 each month the premises were closed. On the date of the complaint, the unpaid balance of the purchase price was $35,000.00 and a payment of $1,500.00, plus interest, would be due on January 1, 1951; additional payments of $1,500.00 or $3,000.00, plus interest, would be due on the first day of each succeeding month. Marcus "* * * claims that he is entitled to the said $1,500.00 installment and interest, and to all the installments constituting the balance of the purchase price, to wit: $35,000.00, and interest, and demands payment of same. Defendant, Milmar Estate, Inc., may claim that it is entitled to the said $1,500.00 installment and interest, and to all the installments constituting the balance of the purchase price, to wit: $35,000.00 and interest." If plaintiffs pay any installment to the defendant not entitled to it, the other defendant might declare an acceleration of the entire balance of the purchase price.[4] Plaintiffs require the protection of this court in

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[2] See Schedule A attached to this opinion.

[3] Exhibit DM-22, a copy of DME-5, the contract, does not contain "up to 50%" in the 5th paragraph, and "at least 50%" in the 10th paragraph. Lieberman testified he called Schwartz and told him of the insertions and Schwartz approved of the same and said he would insert the same in his copy of the contract. Apparently Schwartz failed to do so.

[4] The alleged contract contains an acceleration clause providing that if the buyer defaults in any payments, the unpaid balance shall become due and certain stock held in escrow shall be returned to the seller.

order that they will not be compelled to pay the balance of the purchase price twice and to restrain defendants from calling a default and invoking the acceleration clause. Plaintiffs have deposited the $1,500.00 installment and interest into the registry of the court and have alleged their willingness to deposit the amount of each installment as it becomes due.[5] They demand that the defendants interplead to determine their rights to collect the obligation described in the complaint; plaintiffs also demand a discharge from all liabilities to the defendants.

On December 28, 1950, on plaintiffs' motion the court (1) enjoined the defendants from commencing or prosecuting any legal proceeding affecting the obligation involved in the interpleader action, (2) ordered the defendants (a) to interplead and determine their rights, (b) not to invoke the acceleration clause of the alleged contract, (c) to show cause on January 15, 1951, why plaintiffs should not be discharged from their alleged liability under the alleged contract and why the injunctions in the order should not be made permanent.[6]

The Ancillary Claims

Milmar cross-claims against Marcus, demanding judgment that as a result of the September 14, 1948 transaction, Marcus has no right, title, or interest in any Milmar stock certificates issued prior to September 14, 1948; any

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[5] The total original deposit was $1,700.00. Subsequent to the filing of the complaint, on various dates plaintiffs deposited a total of $34,400.00 into the registry of the court. Thus, the total fund is $36,100.00.

[6] The return date of the order to show cause was adjourned by consent. Finally, the parties agreed that the issues arising under the order should be determined by the court as part of its final opinion and judgment. Those issues relating to whether certain requirements of the Interpleader Act have been met will be discussed.

Milmar stock certificates possessed by Marcus be delivered to Milmar for cancellation; the balance of the proceeds of the condemnation award[7] is the sole property of Milmar and should be delivered and paid to Milmar; an unlawful filing by Marcus of a lis pendens was a malicious use of process for which Milmar demands punitive damages of $100,000.00, and it was also a malicious abuse of process and a malicious prosecution for which it demands $100,000.00, and it was also a slander of title for which it demands $100,000.00, and it was also a malicious interference with a prospective economic advantage for which it demands $100,000.00.

Marcus filed his responsive pleading on October 25, 1954, in which he cross-claims against Milmar and Al Kevelson,[8] and counterclaims against the plaintiffs. His claims are in the alternative: The September 14, 1948, document is null and void, and there is no contract relating to the sale of any Milmar stock; Lieberman must deliver to him all the

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[7] On February 18, 1954, Marcus applied to the court for the appointment of a receiver to take into possession the proceeds of a condemnation award of approximately $757,410.00 by the State of New Jersey for the condemnation of lands of Milmar. On that same day the court ordered the money paid to the Peoples Trust Company of Bergen County, Hackensack, New Jersey, and placed on deposit in an account designated "Walter G. Winne, Master of the United States District Court," District of New Jersey, not to be disbursed except by the express order of this court. In the same order, the court ordered $77,500.00, plus interest, paid to the holder of record of the first mortgage on the condemned lands of Milmar.

[8] His role in this controversy will be described *infra*. On January 14, 1955, the court granted Marcus' motion to join Kevelson as a defendant to Marcus' counterclaim. The order was based on findings that the counterclaim was a compulsory one over which the court had ancillary jurisdiction and that the joinder did not deprive the court of jurisdiction. The same order denied Marcus' similar motion to join Abraham Lieberman, whose role also will be described.

stock and all other documents deposited by him pursuant to the September 14, 1948, document;[9] he is the owner and presently entitled to possession of 1,230 shares of Milmar; Bierman, Miller and Kevelson are not the duly elected officers and directors of Milmar, have no right to act as such and must be restrained from so acting; in the alternative, if the September 14, 1948, document is a contract, $35,000.00, plus $15,000.00 must be paid to him; he is the owner and entitled to possession of 630 shares of Milmar stock; Miller, Bierman, Milmar, and Kevelson have defaulted in paying money due him under the September 14, 1948, contract, so that he has the right to the possession of the Milmar stock held by Lieberman as escrowee, who should deliver to him all documents held by him pursuant to that contract. He also cross-claims against Milmar for $46,801.23 allegedly loaned to it.

Bierman and Miller counterclaim against Marcus: The transaction of September 14, 1948, is a valid contract; Marcus has no right, title, or interest in any of Milmar's stock; Marcus is not an officer or director of Milmar; the $50,000.00 note executed by Miller to Marcus must be cancelled; Bierman, Miller, Milmar, and Bill Miller's Riviera, Inc., must be released from all liability to Marcus, excepting the liability of Miller on the balance of the $15,000.00 note to Marcus; Marcus is not entitled to the return of any documents held by the escrowee, Lieberman; all documents held by Lieberman pursuant to the September 14, 1948, transaction must be delivered to Bierman and Miller; all of the stock of Milmar is owned as follows: Miller, 40%; Kevelson, 40%; Bierman, 20%; Marcus must deliver to Miller all certificates of stock which he holds.

Kevelson cross-claims against Marcus, alleging essentially the same things as do the plaintiffs against Marcus.

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[9] Lieberman holds documents in escrow.

ISSUES

As I see them, the legal and factual issues raised by the pleadings and the evidence are: (1) Has the court jurisdiction under 28 U. S. C. A. § 1335?[10] (2) Are Marcus and Milmar "adverse claimants" who "are claiming or may claim to be entitled" to the unpaid balance of the purchase price of the Milmar stock?[11] (3) What substantive law governs the contract claim? (4) Did Bierman, Miller, Milmar, and Marcus on September 14, 1948, contract for the purchase and sale of any amount of Milmar stock owned by Marcus?[12] (5) If there is a contract, was Marcus fraudulently induced to enter into it? (6) Does Milmar owe Marcus any money which he loaned to it? (7) Was Marcus' filing of a lis pendens (a) malicious use or (b) abuse of process, (c) slander of title, or (d) malicious interference with a prospective economic advantage.[13]

(1) JURISDICTION

The citizenship of the parties is: Plaintiff Bierman, North Carolina; plaintiff Miller, New Jersey; defendant Marcus, New York; and defendant Milmar, New Jersey. There is diversity of citizenship between the two defendants who allegedly are adverse claimants. But does the co-citizenship of Miller and Milmar jurisdictionally affect the requirement of diversity set forth in 28 U.S.C.A. §1335? The question is discussed in 3 Moore, Federal Practice,

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[10] See footnote 1, supra.

[11] See footnote 6, supra.

[12] Is there a contract? If there is, how much stock did Marcus sell?

[13] This issue was raised by Milmar's cross-claim against Marcus. Milmar now asks this court to reserve its decision concerning the issue. Accordingly, the decision will be reserved and if Milmar wishes to pursue that cross-claim, evidence must be submitted.

paragraph 22.09, page 3029 (2nd ed. 1948), where Professor Moore notes that *Treixies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939) does not settle the doubt "* * * whether, under the Interpleader Act, there must be diversity between the complainant and all the claimants, if the complainant has an interest and is not a mere stakeholder * * *." This court agrees with Professor Moore who believes that interpleader relief is proper despite the co-citizenship of a plaintiff with an interest and a defendant who is an alleged claimant. *Ibid.* The dicta in *Boice* v. *Boice*, 135 F. 2d 919 (CA 3, 1943) is not contra. That case also involved a bill in the nature of interpleader. The appellate court affirmed the trial court's order dismissing the complaint which sought interpleader between the defendants. But the court also thought that "* * * the dismissal was right because of an absence of diversity of citizenship between the plaintiff and one of the defendants * * *." Confining that case to its facts, the dicta expresses the court's view that in a case involving a bill in the nature of interpleader where one plaintiff has an active controversy with respect to the subject matter of the suit with one of the defendants whose citizenship is the same as his, the court is without jurisdiction. Although this is also a case involving a bill in the nature of interpleader,[14] that dicta does not apply. Here there is co-citizenship of plaintiff Miller and defendant Milmar. But not only are there two plaintiffs, one of whose citizenship differs from the two defendants, but further analysis demonstrates the inapplicability of that dicta.

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[14] Bierman and Miller are not merely disinterested stakeholders. Clearly they are vitally concerned with the outcome of this action. Although they have never asserted a claim to the unpaid balance of the purchase price of the Milmar stock (see footnote 5, supra) which they have deposited into the registry of the court, their rights concerning the extent of their ownership in Milmar depend upon the court's decision pertaining to the issues raised by their complaint.

Miller's theory pertaining to Milmar is that he and Bierman purchased all of Milmar's stock. Milmar's theory is the same as Miller's. Thus, there is no "active controversy" between Miller and Milmar. This is so even though the interpleader action was commenced on the ground that since the named seller is Milmar, it "may claim" the unpaid balance of the purchase price of the Milmar stock. But, Miller (and Bierman) never have claimed a right to that money. In this case, it is important to distinguish between the phase of the case involving the fund and the controversy concerning the nature of the September 14, 1948, transaction. A similar distinction was made in the *Boice* case, where the Court of Appeals carefully referred to the plaintiff's "* * * active controversy with respect to the subject matter of the suit with one of the defendants * * *." This general language becomes meaningful by referring to the facts of the case described in the lower court's opinion. 48 F. Supp. 183 (D. C. N. J. 1943). In that case, the fund in court resulted from dividends paid to the plaintiff who was formerly a trustee of stock under a declaration of trust. The trust had been terminated, but the stock was still registered in his name. At the time plaintiff commenced the interpleader action, there was a controversy between him and the settlor's wife concerning the right to the stock. Clearly, that plaintiff did not claim any right to the dividends he deposited in court. Thus, the Court of Appeals decided the district court was without jurisdiction because of the plaintiff's active controversy with one of the defendants and both of them were citizens of the same state. But in the case at bar, the two co-citizens (Miller and Milmar) do not have an active controversy with each other, even though one (Milmar) may have had a claim to the unpaid balance of the purchase price of the Milmar stock at the time the action was commenced because it was the named seller.

On the basis of the foregoing, the court concludes that it has jurisdiction under 28 U. S. C. A. §1335.

(2) The Interpleader Act.

Previously, the court decided in an order dated March 24, 1953, that Marcus and Milmar are adverse parties. The question arose on a motion by Milmar to strike interrogatories propounded to it by Marcus. The court's order denying the motion was based on its finding that they were adverse parties. And clearly, on the date of the complaint Marcus was claiming to be entitled to the unpaid balance of the purchase price of the Milmar stock, and Milmar as the named seller in the basic document involved in the transaction "may claim" that money. Thus, they are adverse claimants within the meaning of the interpleader Act.

(3) Governing Law.

Before discussing the remaining issues, what substantive law governs this action?[15] *Kerrigan's Estate* v. *Joseph E. Seagram & Sons*, 199 F. 2d 694 (CA 3 1952) was an interpleader action. The court held that the substantive law governing the action was the state law in which the federal court sat as that state's court had declared it, citing *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U. S. 487 (1941). In the case at bar commenced in this New Jersey federal court, there is a dispute concerning the interpretation of certain documents, which were executed not in New Jersey but in New York. The New Jersey conflict of laws rule is the general rule, viz., the reference regarding question of validity and interpretation of the obligations of the parties is

[15] In the sixteen briefs which have been submitted, there is no discussion of the conflict of laws phase of the case.

to the place of contracting.[16] *Colozzi* v. *Bevko, Inc.*, 17 N. J. 194, 202 (1955); *James H. Rhodes & Co.* v. *Chausovsky*, 137 N. J. L. 459, 462; *Hinkly* v. *Freick*, 86 N. J. L. 281, 283. That place is New York. Thus the substantive law governing this action is New York law as the New York courts have declared it.[17]

Before I recite my findings of facts in this case, I should like to make some observations. The case was tried intermittently without a jury over a period of approximately four months, consuming nineteen full trial days beginning January 29, 1955. The transcript is 2,471 pages, in six volumes, and hundreds of documents are in evidence, with no attempt made to abbreviate them so that I should only consider the parts which were pertinent to the disposition of this case. The record is a very long one and its analysis was a tedious and rather unwelcome task because of truths evaded, half truths, half lies, some perjury, faulty recollection of events, of incidents, and conversations which took place some seven years before the trial. Thousands of pages of depositions were taken and were used often to confront witnesses with statements made at the taking of depositions which were irreconcilable with the testimony given at the trial. Many of the characters involved in this litigation might be well characterized as Damon Runyon types, some of whom had a wholesome disregard for the spirituality of the truth and were actuated in testifying to facts which they thought more helpful to their cause than to establishing the truth of what happened. The record is replete with circumlocutions of the truth and the best that could be said for some of the witnesses is that they had no

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[16] Of course, the threshold question is whether there is a contract. But the documents, whatever may be the legal consequences arising therefrom, were executed in New York.

[17] As a result of counsels' disregard of the conflict of laws problem, their briefs contain mainly New Jersey cases.

recollection of what actually happened, and so they said whatever came to their minds while on the stand. These factors made it rather difficult to find the facts, and I have done the best I can to establish the operative facts under the circumstances.

The bringing of this case to trial was characterized by much unnecessary delay. It appears to me from the activity of some of the litigants that it was deliberately planned to delay the trial of the issues. Countless motions were made before the trial and during the trial; many postponements of arguments on the motions were had for one reason or another. I do not find it necessary to specify who the delayers were. Motions were made during the trial for discovery of documents and books in an effort by one of the litigants to bolster up his case. Great inconvenience was caused in searching for documents which had long since been put away. It meant rummaging through countless files and thousands of papers in an effort to find something to bolster up the case, but all in vain. I found it necessary to force the trial on because several of the litigants were thoroughly disgusted with the delay and appealed to me personally over the heads of their counsel. Their appeals were justified. It became necessary during the course of the trial for the production of typewriter experts, which, in my opinion, were absolutely unnecessary. These facts are recited to show the antagonism which prevailed between the litigants and some of which flowed over and affected counsel, who at times became very antagonistic. In such an atmosphere, the court found it difficult at times to get at the true facts.

Appendix B—Opinion of District Court.

THE FACTS[18]

Bill Miller and Sam Marcus met for the first time in January, 1946. Miller was a well known night-club owner and operator. Marcus was an active enterpreneur in many enterprises and business man principally engaged in the photographic supply business. In April, 1946, they purchased from Michael Realty Co., property located at Fort Lee, New Jersey. The closing statement, dated April 5, 1946, shows that the purchasers were Miller and Marcus. The financing, however, apart from a $300,000.00 purchase money mortgage, was that Marcus contributed $93,750.00, Bierman $20,000.00, and Robert Schwartz $11,250.00.[19] Miller executed and delivered a $50,000.00 demand note, dated April 1, 1946, to Marcus.[20] Additionally, Miller later gave Marcus collateral security consisting of all stock issued to Miller in Milmar Estate, Inc., Bill Miller's Riviera, Inc., and Mocambo, Inc.[21] Shortly after the purchase of the property, Milmar Estate, Inc., was incorporated in New Jersey, and Miller and Marcus conveyed title to it. The Milmar stock-book stubs show that prior to September 14, 1948, certificates were issued: On April 15, 1946, 9 shares to Miller, 9 to Marcus, 2 to Marguerite K. Kane; on June 7, 1946, 982 to Miller, 1,107 to Marcus, 125 to Schwartz;[22] on June 7, 1947, 20 shares to Bierman, Milmar's corporate business was that of a landlord; its ten-

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[18] Since the issues principally involve an interpretation of documents allegedly comprising a contract, the court has been guided in finding the facts by the principles of law set forth *infra* under Issue (4).

[19] Schwartz also was Marcus' attorney.

[20] The note was renewed on June 1, 1947, payable $500 weekly, commencing June 1, 1948.

[21] Exhibit DME-40.

[22] Since the parties included Schwartz' shares as part of Marcus' holdings, in this opinion the court will not separately refer to Schwartz's shares. Schwartz is not a party in this action.

ant was Bill Miller's Riviera, Inc., a New Jersey corporation,[23] whose business was the operation of a fashionable night-club known as "Bill Miller's Riviera."

Both Miller and Marcus were active, on-the-scene, continual participants in the affairs and operation of the Riviera night club enterprise, as evidenced by a letter dated April, 1946, written to Mr. William Miller, signed by Mr. William Miller and accepted by Samuel Marcus. On December 19, 1946, Bill Miller's Riviera, Inc., filed a petition in bankruptcy in the United States District Court for this District. Miller on behalf of the corporation stated in the petition that the corporation was insolvent or unable to pay its debts as they matured; he proposed an arrangement with the corporation's unsecured creditors under Chapter XI of the Bankruptcy Act. In the statement of executory contracts, Miller referred to the corporation's lease with Milmar at a yearly rental of $60,000.00. At the time, the petitioner-corporation owed to Milmar the rent for October, November, and December, 1946. The summary of the corporation's debts showed $183,982.21, as compared with assets of $27,500.00. On April 2, 1947, the Referee in Bankruptcy ordered the proposed arrangement confirmed.

When the Riviera failed to pay rent to Milmar, in July, 1947, Milmar commenced dispossess proceedings. The controversy was settled and a new lease was executed.

The Riviera corporation's financial plight adversely affected the income of Milmar.[24] Marcus unsuccessfully at-

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[23] Miller was a principal beneficial owner of its stock and actively in control of the corporate operations.

[24] Milmar's only income was from Riviera rent. Moreover, Milmar, Miller, and Marcus needed money for their mortgage payments to Michael Realty Co. Despite two helpful modifications of the original mortgage, beginning August 1, 1948, and continuing until July, 1951, their obligation was to pay $5,000.00 each month.

tempted several times to sell his stock interest in Milmar. Finally, on July 27, 1948, he sent an option letter to Miller.[25] Although Miller never exercised his option, on August 18, 1948, Marcus gave a document to Miller.[26] Previously, Miller had asked Marcus for a written assurance of his participation in a proposed transaction. Miller wanted such a document to reassure Kevelson, with whom Miller anticipated financing the ultimate transaction; in fact, Miller already had received $5,000.00 from Kevelson. The contents of the document are set forth in the footnote.[27]

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[25] "This is to substantiate our verbal understanding that you are hereby given a ten-day option in which to purchase *my holdings* of the Milmar Estates Inc., owners of the Riviera property for the sum of $125,000.00 payable $30,000.00 cash and the balance at $4,000.00 per month.

"Inasmuch as I am dickering with other interested parties, I cannot make any more than a ten-day option at this price and this option expires midnight the 6th day of August, 1948." (Emphasis supplied.)

[26] Although the disputed transaction did not occur until September 14, 1948, the prior negotiations are relevant evidence in interpreting the legal consequences of the transaction. This is so because Marcus contends that this court should construe the documents involved in the transaction to mean something else than their words indicate. Under New York law, the parol evidence rule is not thereby violated. *O'Neil Supply Co.* v. *Petroleum H. & P. Co.*, 280 N. Y. 50, 55, 56 (1939); 1 *Corbin on Contracts*, § 22, p. 53 et seq. (1950).

[27] "Agreement made this day between William (Bill) Miller hereinafter called party of the first part also known as the buyer and Sam Marcus hereinafter called party of the second part also known as the seller. The party of the first part agrees to purchase *all right, title and interest including all outstanding stocks,* notes, I.O.U.'s options, agreements and any other transactions that the party of the second part has participated in with the party of the first part including the agreements in the following companies and corporations.

1. William (Bill) Miller
2. *Milmar Realty Corp.*
3. Bill Miller's Riviera, Inc.

(Continued on following page)

On or about August 26, 1948, Marcus gave another document to Miller.[28] It was a letter in which Bierman offered to buy all of Marcus' shares in Milmar "* * * consisting of approximately 62½% of the outstanding shares (described as all those shares not held by Bill Miller or Al Bierman) for the sum of $125,000. payable as follows: $19,000. on execution of this agreement, receipt whereof is hereby acknowledged. $11,000. upon execution of the necessary papers called for in this agreement. $3,000. each month on the first day of each and every month that the Riviera (or successor)[29] $1,500. each month of the first day of each and every month that the Riviera is closed; * * *."

(Continued from preceding page)

The party of the second part herewith agrees to sell all of the above mentioned assets which he now claims he is the sole owner and agrees to the following terms of payment for all of the above mentioned items.

"The purchase price for all of the items herein mentioned is One Hundred and Twenty five Thousand Dollars ($125,000.00) to be paid as follows:

"The party of the first part agrees to pay $5,000.00 to the party of the second part upon the signing of this agreement.

" Dollars to be paid by the party of the first part to the party of the second part upon final signing of all papers releases and whatever other documents that will be necessary to be signed to release Bill Miller and all of the other companies and corporations herein mentioned.

"The balance of Dollars to be paid as follows:

"First payment of Three Thousand Dollars shall be paid one Month from date the final documents shall be signed and delivered. Thereafter a payment of Three Thousand Dollars shall be made each month that Bill Miller's Riviera shall be open for business. In the period that Bill Miller's Riviera shall be closed and not open for business a payment shall be made each month of One Thousand Five Hundred Dollars.

"Upon the signing of this agreement it shall be a legal and irrevocable contract." (Emphasis supplied.)

[28] Exhibit DME-2.

[29] The sentence is incomplete.

On August 27, 1948, Marcus received two $5,000.00 checks from Bierman. Marcus signed a receipt for the checks[30] which were a "* * * deposit pending negotiations for the purchase of my [Marcus'] stock of the Milmar Estates, Inc., which includes all outstanding stock excepting that stock owned by William Miller and Al Bierman." The receipt as typewritten contained the figure "$19,000"; "$10,000.00" was inserted in ink and the insertion was initialed by Marcus and Bierman.[31] This receipt was typed or dictated by Marcus on Riviera stationery.

On or about August 28, 1948, there was a meeting in Marcus' New York City office. The participants were Miller and his attorney Lieberman, Marcus and his attorney Schwartz. There was a discussion regarding the sale to Miller and Bierman of all the interests held by Marcus in Milmar. At the end of the conference Miller and Marcus instructed the attorneys, Lieberman and Schwartz, to prepare an agreement to provide for the sale by Marcus of all his interest in Milmar to Miller and Bierman for $125,000.00. The attorneys knew the proposed terms of the contract because the three above-described documents were shown to them during the conference.

On September 14, 1948, the same four men met in Schwartz's New York City law office. The purpose of their meeting was to conclude the pending transaction between Miller and Marcus regarding the sale of Milmar stock to Miller and Bierman.[32]

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[30] Exhibit DME-1.

[31] Bierman's deposit was reduced $9,000.00 because when he produced two $5,000.00 checks and $9,000.00 cash, Marcus refused to accept the cash.

[32] Miller was authorized by Bierman, who was in North Carolina to "* * * sign my name to all papers legalizing sale of Milmar Corporation to me."

In the basic document the parties are identified as Milmar Estate, Inc., seller, and Al Bierman and William Miller, buyers. The document recites that Milmar has an authorized and issued stock consisting of 1,250 shares of common stock; "the buyer" (Bierman and Miller) desires to purchase from Milmar all of that stock; Milmar sells to the buyer "* * * all of the issued and outstanding shares of the Corporation."; the price is $125,000.00, payable $30,000.00 cash upon execution of the agreement, $95,000.00 "* * * by the Purchaser executing a Purchase Money Mortgage on the real estate and chattels, with interest at four (4%) per cent, and containing the following terms: * * *." $3,000.00 every month that the Fort Lee premises are open for business, $1,500.00 every month that the premises are closed. Further, it is provided that "The stock up to 50%[33] herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABE LIEBERMAN, ESQ. * * * immediately upon the execution of this Agreement with instructions to the said ABE LIEBERMAN to deliver the sale of the said stock to the Buyer upon payment of the full amount due hereunder." The document also contains a default clause, a promise by the buyer to assume a first mortgage, taxes, and insurance debts of Milmar. It is signed on behalf of Milmar by Sam Marcus, President, and on behalf of Bierman by Miller, who also signed his own name.

Other pertinent documents executed by the parties on September 14, 1948, were:[34] (1) A letter addressed to Milmar signed by Miller confirms "our" understanding that

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[33] "Up to", of course, is imprecise language. Miller, Marcus, and their lawyers, however, in fact did deposit exactly 50% of the stock in escrow.

[34] The parties intended all of the documents to constitute their transaction.

Miller will deposit with Lieberman at least 50%[35] "of all of the stock of Milmar Estate, Inc., and 50% of Bill Miller's Riviera, Inc., which shall consist of my own and Al Bierman's." (2) An escrow receipt signed by Lieberman acknowledges that he held certain documents in escrow including "625 shares of Milmar Estates, Inc."[36] (3) A letter signed by Marcus as president of Milmar addressed to Bierman confirms their understanding that Milmar represents that it will pay all of the present outstanding obligations of Milmar "* * * consisting of the corporation's obligations for legal fees or other obligations and loans *to* Samuel Marcus personally." (Emphasis supplied)[37] (4) A real estate mortgage by Bierman and Miller as mortgagors, and Milmar as mortgagee, to secure the payment of the $95,000.00 debt resulting from the basic sale of Milmar stock. The subject matter of the mortgage was land, furniture, fixtures, and equipment then located on the premises as set forth in (5) A chattel mortgage with Bierman and Miller as mortgagors, and Milmar as mortgagee, to secure the payment of the $95,000.00 debt. It is recited that the goods covered by the mortgage are "* * * mentioned in the schedule hereunto annexed * * *." However, the schedule page is blank.[38] (6) Marcus, acting as president of Milmar, confirmed with Miller their understanding arrived at

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[35] "At least" also is imprecise language.

[36] As will appear *infra*, 625 shares was 50% of the *then* issued and outstanding shares of Milmar stock.

[37] This is another example of the sloppy drafting of the documents in this case. Obviously, the intention was by Samuel Marcus personally.

[38] The two mortgages are of doubtful legality for at the time they were executed the named mortgagors did not own the land or the chattels. Milmar was the owner of the real estate and Bill Miller's Riviera, Inc., of the personal property. When queried as to why these futile documents were drawn, both attorneys replied that Marcus demanded the same.

September 2, 1948, which included "in the event that the contract of purchase, dated September 14th, 1948, is fulfilled, the said note of Fifty thousand ($50,000.00) Dollars is to be returned to you and we agree to exchange mutual releases."[39] (7) Statement signed by Miller to the effect that he promised to pay to Marcus $15,000.00, plus 4% interest, subject to certain conditions.[40] (8) Letter by Miller to Marcus confirming their understanding that all of Marcus' tabs and checks signed by him at the Riviera were cancelled. (9) Two identical letters by Marcus and Schwartz to Milmar: "The undersigned hereby resigns as an officer and director of the corporation, effective immediately." (10) Milmar Estate, Inc., stock certificate Nos. 17, 18, 19, and 20, totaling 1,250 shares. Marcus is named as the owner of the shares; on the rear of each share at the bottom of the printed form of assignment and transfer, Marcus signed his name, although no other handwriting appears thereon. Miller and Marcus agreed that the form of the transaction would be a sale of stock. Neither Miller nor Marcus produced their stock certificates for assignment to the purchasers. Thus, the mechanics of the transaction were that the certificate stubs of the then issued and outstanding shares were marked cancelled, and the parties agreed that the absent certificates would be deemed to have been surrendered back to Milmar. Then the four new certificates totaling 1,250 shares were issued in Marcus' name; he endorsed in blank and delivered the certificates to Lieberman; two certificates representing 625 shares were given to Lieberman to be held by him in escrow, and two certificates representing 625 shares were left

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[39] See footnote 20, supra.

[40] Miller obligated himself to pay the $15,000.00 in addition to his obligation under the basic document "in order to sweeten up the deal."

with Lieberman apparently in his capacity as Miller's lawyer.[41]

This court has found the above-narrated facts as they are evidenced by the many negotiation documents, those executed during the September 14, 1948, meeting and the believable testimony. What legal conclusions must be based thereon?

(4) Is There a Contract? If There Is, What Was Sold?

Marcus has made many arguments relating both to the existence of a contract and the interpretation of any contract held to exist. Thus, based upon research of New York law, the court will set forth the principles of contract law which a New York court would apply to the facts.

This court will not make a contract. If the parties intended to enter into a contract, however, the court will attempt to give effect to a transaction that was not only serious, but which is solemnly recorded by many documents signed by the two men who now are the principal disputants.[42] There is no doubt that the parties intended to make a contract. This court is clearly convinced that on September 14, 1948, the parties believed themselves to be making a contract, to be affecting their legal relations with each other. Thus "* * * sound practical policy requires that their mutual expressions should be given an interpretation that will effectuate their belief and intention * * *." *Ibid.* The court's research of New York law did not disclose any cases contrary to such sound principles.

What was sold under the contract? "It is well settled that in construing the provisions of a contract we should

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[41] Undoubtedly, the documents drafted for the transaction lacked legal craftsmanship. Nevertheless, as will be discussed below, there is no doubt regarding the intentions of the parties.

[42] See 1 *Corbin on Contracts,* § 149, pp. 483, 486 (1950).

give due consideration to the circumstances surrounding its execution, to the purpose of the parties in making the contract, and, if possible, we should give to the agreement a fair and reasonable interpretation * * *." *Aron* v. *Gillman*, 309 N. Y. 157, 163 (1955). The ascertainment of the substantial intent of the parties is the fundamental rule in the construction of all contracts. *Madawick Contracting Co., Inc.* v. *Travelers Ins. Co.*, 307 N. Y. 111, 119 (1954). The court ascertains that intent not by a literal reading of the words of the contract, nor by a strict grammatical reading of the words, but by reading them in the light of the circumstances existing at the making of a contract. *O'Neil Supply Co.* v. *Petroleum H. & P. Co.*, 280 N. Y. 50, 55, 56 (1939); *Wirth & Hamid Fair Booking, Inc.* v. *Wirth*, 265 N. Y. 214, 219 (1934); *Becker* v. *Frasse & Co.*, 255 N. Y. 10, 14 (1930). The liberal New York law relating to the interpretation of a contract is shown by *Empire Properties Corp.* v. *Manufacturers Trust Co.*, 288 N. Y. 242, 248, 249 (1942), "We have said, 'The intention of the parties must be sought for in the language used. To understand the language we may put ourselves in their place and discern if possible the objects they had in view and the motives which dictated their choice of words. A wider meaning may thereby be disclosed.' (*Halsted* v. *Globe Indemnity Co.*, 258 N. Y. 176, 180.) The object which the parties had in view is, in this case, clear, and so are the motives which dictated their choice of words. The construction which has been placed upon the words the parties have chosen might defeat the object of the parties. The parties have chosen words which leave room for construction. Even literal construction would leave the meaning of the words open to doubt. The courts should then choose that construction which will carry out the plain purpose and object of the indenture."

Applying these principles of interpretation the court as is suggested by its previous finding of fact concludes that Bierman and Miller purchased *all* of Milmar's stock, consisting of 1,250 shares. The price was $125,000.00 payable to Marcus: $30,000.00 cash upon execution of the contract and $95,000.00 pursuant to the aforementioned installment payment formula. Miller contracted to pay Marcus an additional $15,000.00, plus 4% interest. Fifty per cent of the 1,250 shares being sold were deposited in escrow with Lieberman, who was to deliver them to Bierman and Miller when they made their final installment payment. Marcus contracted to release Miller from his $50,000.00 debt evidenced by his aforementioned June 1, 1947, note. Marcus and Schwartz resigned as officers and directors of Milmar.

Confronted with such evidence concerning the nature and extent of the sale of all Milmar stock, plus his complete withdrawal from active participation in the affairs of Milmar,[43] plus payment to him of $66,004.96 pursuant to the installment payment formula set forth in the contract,[44] litigant-Marcus—compared with seller-Marcus—now asks this court to conclude either that no affirmative legal effect resulted from the documents executed on September 14, 1948, or that he sold only one-half of the total issued and outstanding shares of Milmar. In support thereof, Marcus

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[43] After September 14, 1948, although Miller was continually present at the Riviera night-club, he did not see Marcus again until 1951 when he testified by deposition in this case.

[44] Twenty-seven checks are dated from October 1, 1948, to December 1, 1950, to Marcus as payee, signed by either Miller or Kevelson (as president of Milmar) as payor, endorsed (strangely, two are not, although they appear to have been cashed) by Marcus and in amounts identical to the installment payment formula. With but two exceptions, on the face of every check is a computation of the interest and principal, which clearly evidences payments pursuant to the September 14, 1948, contract. And, also pursuant to that contract, the spring-summer-fall checks include $3,000.00 payments.

cites cases which are authority for general and basic principles of contract law, e. g., the terms of the purported contract must be such that their meaning can be ascertained to a reasonable degree of certainty; there must be a meeting of the minds or there is no contract. But they are merely conclusions of law applied to the facts of a particular case. As has been discussed, the evidence clearly supports two main conclusions, viz., the parties intended to contract and to sell and buy all of Milmar's stock. Indeed, it was not until after the commencement of this action that Marcus' intent was otherwise, for his conduct prior to that date was that of a man whose legal rights in Milmar had changed.[45]

(5) Fraud

Marcus seeks rescission of the contract on the ground that there was "* * * a scheme of fraud on the part of Miller, starting in March 1946, and continuing up to and including the 14th day of September, 1948, designed to give an unconscionable advantage over Marcus." Disregarding Marcus' irrelevant and frivolous arguments, his theory of fraud is based upon his uncorroborated testimony that about August, 1948, Miller falsely represented to him that the Riviera night-club enterprise was losing money and that he was in danger of losing his entire investment. Under New York law, since Marcus does not seek damages he does not have to prove an intentional misrepresentation. His burden is, however, to prove a (1) misrepresentation, and that (2) it materially influenced the bargain. *Bloomquist* v. *Farson*, 222 N. Y. 375, 380 (1918). It is Hornbook law that in all rescission action the victim must establish (1) that the defendant was guilty of fraud or misrepresentation, and (2) plaintiff was deceived thereby.

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[45] See footnotes 43 and 44, supra.

There is no proof either that Miller made the statement or that it was false. Even assuming that there was such proof, there is a complete absence of any proof that Marcus was materially influenced or deceived by the misrepresentation. Indeed, the proof is otherwise, for during the trial this court noted that Marcus had used the opportunity granted to Milmar in its lease with Bill Miller's Riviera, Inc., to examine the books.[46] The court said: "I am convinced that Mr. Marcus knew more about the books prior to September 14, '48, than Mr. Miller will ever know. I can infer that from what I have heard already." The court's opinion has not changed, but, in fact, has been fortified. Marcus tried to create the impression that the Riviera was doing marvelous business. This despite the fact that the evidence discloses that it never paid its rent on time to Milmar, went through bankruptcy, and was constantly in arrears on the payments of interest and installments on the purchase money mortgage. As a matter of fact, the purchase money mortgage mortgagee sold the mortgage at a 15% discount. The evidence further discloses that Marcus had complete access to the books of both the Riviera and Milmar which were kept by Jacob Hoffman, who was Marcus' accountant, not Miller's. Hoffman testified that he reported weekly to both Miller and Marcus as to the business of the Riviera.

Marcus further attempted to prove by mathematical computations purportedly based on an examination of the Riviera's books that the Riviera was earning a profit during the time that Miller allegedly told him it was losing money. The evidence is incomplete, inconclusive, and does not support Marcus' conclusions. Moreover, on July 27, 1948, Marcus sent the aforementioned option letter to

[46] "The Landlord shall have an absolute right to check any and all receipts, computations, cash registers, guest checks, billings for each and every book of account maintained by the Tenant."

Miller.[47] Thus, prior to the time when the alleged misrepresentations were made to him he had already decided not only to sell his interest in Milmar but at a price less than he ultimately received.[48] From these facts it is reasonable to infer that Marcus' decision to sell his Milmar stock was not based upon Miller's alleged misrepresentation but was a business decision made with full knowledge of the Riviera's financial status.

(6) The Alleged Loans

While the parties have raised many issues of fact in this case, none has been more bitterly contested than the issue relating to the money allegedly loaned by Marcus to Milmar. Marcus' cross-claim against Milmar for $46,801.23 is based on his allegation that beginning on July 16, 1946, through September 15, 1948, he loaned $67,997.23 to Milmar and Milmar has repaid him only $21,196.00. He also alleges that the repayments "* * * became due and payable five years from the 23rd day of July, 1947, and are now due and owing", evidently having in mind the statute of limitations. While there are numerous examples of Marcus' failure to prove the alleged loans, one will suffice for my purpose because it is typical. As evidence of a $5,100.00 loan on December 28, 1946, he relies upon a page from Milmar's general ledger, journal, and cashbook. The page is entitled "Loans Payable S. Marcus." For the year 1946 it does not contain any $5,100.00 entry.[49] Not only has Marcus failed in his attempted documentary proof of loans, but his unconvincing testimony relating thereto does

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[47] See footnote 25, supra.

[48] The option gave Miller the right to purchase Marcus' stock for $125,000.00. The final contract also called for $125,000.00, but Marcus and Miller agreed that he would pay an additional $15,000.00.

[49] Exhibit DM 14, page 10.

not support his contentions. Moreover, during his deposition on December 19, 1951, Marcus repeatedly was asked whether he had any claims against Milmar for money. At that time he didn't know whether he had such claims.[50] The claims were not made until he filed his cross-claim on October 25, 1954. Surely his memory was better in 1951 than in 1954.

The parties were instructed at the conclusion of the trial to submit to the court proposed findings of ultimate facts

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[50] "Q. I am not asking you about other people. I am asking you specifically whether you have any claims for money against Milmar Estates, Inc.? A. I do not know to whom I have to look for money for claims.

* * * *

"Q. What is your answer? A. My answer is I do not know to whom I have claims for money.

"Q. Mr. Marcus, you are an intelligent man. You understand the question. I am asking you specifically: Do you have any claims for money against Milmar Estates, Inc.? A. And I am answering just as specifically: I don't know to whom I have to look for redress on money.

"Q. Then you do not know whether you have any money claim against Milmar Estates, Inc.? A. That's right, I don't know definitely to whom I have to look for money.

"Q. Do you have any other claims against Milmar Estates, Inc.? A. I don't know at this time.

* * * *

"Q. Do you have any money claims against Jacob Hoffman? A. Yes, I do.

"Q. Are they in any way related to Milmar Estates, Inc., * * * ? A. No, they are not.

"Q. Do you have any other claims against Jacob Hoffman relating to Milmar Estates, Inc., * * * ? A. I don't know at this time.

* * * *

"Q. * * * Do you know of any facts which may give you any claims against Milmar Estates, Inc., * * * ? A. I have been advised by my attorneys that the situation is so muddled up that they could give me no advice of any definite character as

(Continued on following page)

"with specific reference to where these facts are found in the transcript"[51] because the court realized in a lengthy case of this character where there was so much irreconcilable contradiction in testimony that "fact finding would be a difficult art," as has been stated many times by learned judges. Marcus' proposed findings of fact concerning the loans failed to cite a single reference to the transcript to support his statements. His failure to do so made it necessary for me to read many pages of testimony and to examine countless documents in order to establish the ultimate facts. With the state of the record, it was humanly impossible to find the truth in relation to the loans because there was nothing but hopeless confusion in testimony regarding the alleged loans. Marcus has failed to satisfy me by a fair preponderance of the evidence that Milmar owes him anything.

On the issue of credibility, I should mention that Marcus admitted that he often signed affidavits without reading them. I called his attention to the fact that affidavits were sworn statements, he still said he signed them often without reading them.

It became necessary for Milmar to institute a dower action in the Superior Court of New Jersey against Sarah Marcus, the wife of Samuel Marcus. This action was settled for $7,500.00. This action was necessitated because the lawyers who handled the transaction did not realize

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(Continued from preceding page)

to what our claims are, against whom the claims are to be instituted.

* * * *." Deposition upon oral examination of Samuel Marcus, dated December 19, 1951, pp. 95-100.

The excerpts from the deposition of Samuel Marcus were put into the record pursuant to a stipulation made in court. (T. 2468.)

[51] T. 2467.

that a wife's right of dower had not been abolished in New Jersey. This was in connection with the transfer of title from Marcus and Miller to Milmar Estate, Inc. Marcus claimed he knew nothing about this action and had nothing to do with it, despite the fact that he and his wife were living together in their matrimonial abode. This is an incredible situation, particularly since Mrs. Marcus was represented by Mr. Roth of the New York Bar who also represented Marcus. As a matter of fact, Mr. Roth sat in during the trial of this case as associate counsel for Marcus and appeared as a witness for him.

An order may be submitted in conformity with the findings of fact and conclusions of law expressed in this opinion.

Exhibit D-ME 5, Annexed to Opinion of

Modarelli, *D. J.*

(See Opposite ☞)

AGREEMENT made this 14th day of September, 194., in the City and State of New York between MILLER ESTATES, INC., a New Jersey corporation (hereinafter referred to as the "Seller", party of the first part, and AL. BIRNBAUM and William Miller both residing at Fort Lee, New Jersey (hereinafter referred to as the "Buyer"), party of the second part.

W I T N E S S E T H :

WHEREAS, the corporation is duly organized in the State of New Jersey and has an authorized and issued stock consisting of 1250 shares of Common Stock; and

WHEREAS, the Buyer is desirous of purchasing from the Seller all of the issued and outstanding capital stock of the Corporation;

NOW, THEREFORE, it is mutually agreed as follows:

1. The Seller hereby sells to the Buyer,

and

WHEREAS, the Buyer is desirous of purchasing from the Seller all of the issued and outstanding capital stock of the Corporation;

NOW, THEREFORE, it is mutually agreed as follows:

1. The Seller hereby sells to the Buyer, and the Buyer hereby purchases from the Seller all of the issued and outstanding shares of the Corporation.

2. The price for such shares of stock which the Buyer hereby agrees to pay shall be in the sum of One Hundred Twenty-Five Thousand ($125,000.00) Dollars, payable as follows:

-Thirty Thousand ($30,000.00) Dollars in cash upon execution of this agreement, receipt whereof is hereby acknowledged;

-Ninety-five Thousand ($95,000.00) Dollars by the Purchaser executing a Purchase Money Mortgage on the real estate and chattels, with interest at four (4%) per cent, and containing the following terms:

D-ME 5

Three Thousand ($3,000.00) Dollars each month on the first day

SCHEDULE A

of each and every month that the premises in question located at Fort Lee, New Jersey, are open for business. Fifteen Hundred ($1500.00) Dollars each month on the first day of each and every month that premises are closed; and for the purpose of this clause, the question of whether or not the Riviera is open or closed during any given month shall be the state of affairs that prevails on the first day of each month. The said Purchase Money Mortgage shall be prepared upon the usual forms of any regular title company doing business in the State of New Jersey.

The mortgage shall contain a clause providing for a 50% release after every $25,000. shall have been paid.

~~3. The Seller is authorized to pay all of its outstanding obligations of whatsoever kind and description may be contained upon the corporate books, and to pay over at the closing the surplus remaining, if any.~~

4. The Seller and the Buyer agree that the liquor license will be continued until such time as may be required to transfer and turn over the said liquor license to the Buyer, but without any cost or expense to the Seller.

45 50%

5. The stock herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABR

~~3. And further is authorized to pay and discharge its outstanding obligations of whatsoever kind and description may be contained upon the corporate books, and to pay over at the closing the surplus remaining, if any.~~

4. The Seller and the Buyer agree that the liquor license will be continued until such time as may be required to transfer and turn over the said liquor license to the Buyer, but without any cost or expense to the Seller.

4 to 50%

5. The stock herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABE LIEBERMAN, ESQ., of 4000 Bergenline Ave., Union City, New Jersey, immediately upon the execution of this Agreement with instructions to the said ABE LIEBERMAN to deliver the sale of the said stock to the Buyer upon payment of the full amount due hereunder.

6. In the event of the Buyer failing to pay the amount due hereunder, or in the event that the Buyer shall default in making any one of the payments due hereunder, then the balance remaining unpaid shall immediately

become due and payable, and in such event the shares of stock remaining in escrow shall be returned by the said ABE LIEBERMAN to the Seller.

7. The Buyer agrees to assume and perform all of the outstanding contracts and obligations, ~~of every nature and kind whatsoever~~ coming due on the mortgage, taxes and insurance of MILMAR ESTATES, INC. and covenants and agrees to indemnify and hold the Seller and the stockholders of the said Corporation, its officers and directors harmless from and against ~~all~~ said claims, ~~demands, liabilities now existing and arising or that may hereafter arise, in connection with any such claims, liabilities, contracts and obligations whatsoever.~~

8. ~~The Buyer shall not borrow money on the property and does not have any power to encumber the property of the Corporation with any mortgages, including chattel mortgages, conditional Bills of Sale, liens or encumbrances of any kind or nature, without the written consent of the Seller first obtained, except as provided in~~ The Buyer agrees not to encumber the property of the Corporation with any mortgages, including chattel mortgages, conditional Bills of Sale, liens or encumbrances of any kind or nature, without the written consent of the Seller first obtained, except as provided in a chattel mortgage

9. It is understood that no representations

now existing and arising or that may hereafter arise, in connection with any such [illegible], liabilities, contracts and obligations whatsoever.

9. [illegible] The Buyer agrees not to encumber the property of the Corporation with any mortgages, including chattel mortgages, conditional Bills of Sale, liens or encumbrances of any kind or nature, without the written consent of the Seller first obtained, except as provided in a chattel mortgage

10. It is understood that no representations have been made by the Seller to the Buyer, as to the value of or the condition of the property of the Corporation, nor as to any other item or thing, except as set forth in this agreement.

10. The Buyer shall have the right to assign this agreement to a New Jersey corporation, without the consent of the Seller, provided, however, that William Miller and Al Bierman shall be the principal stockholders of the

said corporation. In the event such new corporation is formed, MILMAR ESTATES, INC. shall not be dissolved but shall be continued in existence. The parties further agree that at least 51% of the shares of stock in the new corporation shall immediately be placed in escrow with ABE LIEBERMAN, ESQ., pending the fulfillment of each and every term of this agreement.

11. All of the terms and conditions contained in this agreement shall survive the transfer of title to the stock called for in this agreement.

12. In the event of condemnation of the property owned by MILMAR STATES, INC. all moneys due on ~~received by the Purchaser, or his executors, heirs and assigns~~ the second mortgage, will be paid over promptly to the Seller and the Seller agrees to apply all such amounts received on account of this contract. In the event this contract is assigned, it is a condition of this agreement that the new corporation shall be bound by the terms of this clause. (AL, RS)

IN WITNESS WHEREOF, the parties have hereunto set their corporate seals the day and year first above written.

MILMAR ESTATES, INC.

By: [signature] Pres.

[signature]

By: [signature]

Attest:

[signature]
Secretary

2. Final Judgment of District Court (October 19, 1956) (R. 2022a-2025a).

This cause coming before the court at a hearing on motion for entry of final judgment, to dismiss part of cross claim of Milmar Estate, Inc., against Samuel Marcus, and application for counsel fees; and the court having heard the evidence, and having considered the motions of the parties, and the legal arguments, and having read and considered the briefs of the parties, and the court having stated the issues, the findings of fact and conclusions of law in its opinion filed March 12, 1956, which findings and conclusions are incorporated her in;

IT IS on this 19th day of October, 1956, ORDERED, ADJUDGED, DECREED, FOUND, AND DECLARED THAT:

1. The court has jurisdiction over all the parties and claims; the plaintiff's complaint was filed in good faith and for good cause and the plaintiffs, Al Bierman and William Miller, are discharged from any and all liability to Milmar Estate, Inc., and Samuel Marcus in the making of any payments on account of the purchase price or on account of any balance arising out of or with respect to a transaction which culminated in the contract entered into on the 14th day of September, 1948, among the parties to this action relating to the sale of stock of Milmar Estate, Inc.

2. Judgment is entered in favor of Al Bierman, William Miller, Milmar Estate, Inc., and Al Kevelson against Samuel Marcus on each and every claim asserted by the respective parties against Samuel Marcus, except as otherwise provided in paragraphs, 10, 11, and 13 herein.

3. Each and every claim of Samuel Marcus asserted by way of or in any answer, cross claim, counterclaim, or third party claim, is in all things denied, and as to each of such claims of Samuel Marcus judgment is entered in favor of Al Bierman, William Miller, Milmar Estate, Inc., and Al

Kevelson, except as otherwise provided in paragraphs 10, 11, and 12 herein.

4. All stock or stock certificates in or of Milmar Estate, Inc., in the possession, custody, or control of Samuel Marcus, and all stock of Milmar Estate, Inc., bearing date prior to September 14, 1948, be and hereby are declared cancelled, null, and void; Samuel Marcus has no right, title, or interest in or to any stock or stock certificates of Milmar Estate, Inc., all stock certificates of Milmar Estate, Inc., in the possession, custody, or control of Samuel Marcus shall be forthwith delivered to Milmar Estate, Inc., to be physically cancelled.

5. The transaction entered into among the parties on September 14, 1948, was a purchase of all of the stock of Milmar Estate, Inc., consisting of 1250 shares by the plaintiffs, Al Bierman and William Miller. Milmar Estate, Inc., is not in any manner or on any claim or for any reason indebted to Samuel Marcus for any alleged loans or advances.

6. The balance of the proceeds of the condemnation award made in favor of Milmar Estate, Inc., by the commissioners in condemnation in the matter of the petition of the State Highway Commissioners of the lands of Milmar Estate, Inc., which money was ordered deposited in the Peoples Trust Company of Bergen County in the account designated "Walter G. Winne, Master United States District Court," which balance now totals $569,674.70 was and always has been the sole property of the defendant, Milmar Estate, Inc., and that balance now on deposit shall be delivered and paid within ten (10) days after this date to Milmar Estate, Inc., through Maurice C. Brigadier, its attorney, and the said account of Walter G. Winne, Master United States District Court, be closed. Walter G. Winne, Master, shall receive a fee of $3,500.00 for his services as the Master of this court, to be paid him herewith from the monies in his hands.

7. The agreement of September 14, 1948, is a valid agreement.

8. Samuel Marcus is not an officer nor a director of Milmar Estate, Inc.

9. The note bearing date of June 1, 1947, in the amount of $50,000.00 executed by William Miller to Samuel Marcus is cancelled.

10. Al Bierman, William Miller, and Milmar Estate, Inc., are each and all released from all liability to Samuel Marcus, except as to the liability of William Miller on the balance of a $15,000.00 note executed to Samuel Marcus as provided in paragraph 11.

11. Judgment is entered in favor of Samuel Marcus and against William Miller in the sum of $5,800.00 and interest at 4% running to the date of payment on the unpaid balance of $15,000.00.

12. Samuel Marcus is not entitled to the return of any stock, papers, agreements, or documents deposited with Abraham Lieberman, Esq., as escrowee; each and all of which shall be forthwith delivered to Al Bierman and William Miller.

13. It is ORDERED that there be awarded $500.00 as counsel fees to Chazin & Chazin, attorneys for plaintiffs, which amount the Clerk of the Court is directed to pay forthwith to them out of the interpleaded fund deposited in this court. On his claim to the interpleaded fund, judgment is entered in favor of Samuel Marcus in the amount of $35,600.00 which is the total interpleaded fund less the award of counsel fees to Chazin & Chazin, and the Clerk of the Court is ordered to pay forthwith that amount to Samuel Marcus out of the interpleaded fund deposited in this court. All other applications for counsel fees are disallowed.

14. It is Ordered that costs be awarded against Samuel Marcus in favor of the plaintiffs, Al Bierman and William Miller, the defendant, Milmar Estate, Inc., and the added third-party defendant, Al Kevelson, in the sum of $659.52, which are their expenses paid to the Court reporter to obtain for this court a transcript of the trial of this action. The court hereby finds good cause for the granting of the aforementioned costs against Samuel Marcus all in compliance with the applicable rules, statutes, and practice of the court. The Clerk of this Court is directed to enter the within judgment and to tax all costs as are provided by law.

15. Further proceedings, decision, and judgment are reserved on the claims asserted against Samuel Marcus on the 4th, 5th, 6th and 7th counts of the cross claim of defendant, Milmar Estate, Inc., which counts allege causes of action against Samuel Marcus for the filing of a lis pendens as a malicious use of process and malicious abuse of process, slander of title and a malicious interference with a prospective economic advantage. The court expressly determines that there is no just reason for a delay in the entry of a final judgment as to all matters except said 4th, 5th, 6th, and 7th counts of the cross claim of defendant, Milmar Estate, Inc.

s/ Alfred E. Modarelli.
Alfred E. Modarelli,
United States District Judge.

3. Opinion of Court of Appeals (July 3, 1957) (246 F. 2d 200) (R. Pr. Ct. App.).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,073

AL BIERMAN AND WILLIAM MILLER

v.

SAMUEL MARCUS AND MILMAR ESTATE, INC.,
A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY

SAMUEL MARCUS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 7, 1957

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 3, 1957.)

HASTIE, *Circuit Judge.*

As instituted in the district court this proceeding appeared to be an unexceptional strict interpleader with Miller, a citizen of New Jersey, and Bierman, a citizen of

North Carolina, asking the court to decide whether Marcus, a citizen of New York, or Milmar, Inc., a New Jersey corporation, was entitled to certain money which plaintiffs admittedly owed to someone. The plaintiffs pictured their dilemma as arising out of a contract under which they purchased stock of Milmar, Inc. and agreed to pay for it in installments. The complaint asserts that Marcus is claiming and that Milmar, Inc., "may claim" the unpaid installments of purchase money. The plaintiffs cast themselves in the role of disinterested stakeholders. Accordingly, beginning when the complaint was filed and continuing periodically thereafter for about two years, the plaintiffs deposited with the court the entire balance of the purchase money, in all about $35,000.

It was not until October 1954, four years after the complaint was filed and two years after the last installment of purchase money had been paid into court, that any pleading was filed by either defendant. At that time answers were filed by the defendants together with cross claims raising a variety of other contentions among the parties. It is noteworthy that the answer of Milmar, Inc., admitted that the money was owed to Marcus while Marcus claimed, among other things, not that he should receive the impleaded fund, but rather that he had been defrauded in the original transaction. This four year delay and the failure of either defendant, even then, to claim the fund as paid into court strongly indicate that something very different from what had been alleged in the interpleader complaint was actually in controversy. Indeed, the pleadings subsequent to the complaint and the evidence introduced by the parties disclosed that the matters in controversy were the amount of stock Marcus had agreed to sell to Miller and Bierman and whether, for reasons we need not consider, Marcus was entitled to have the transaction set aside as fraudulent. In addition, the hearing disclosed a number of very involved disputes among the

parties with the reference to a night club venture which had been incorporated as Milmar, Inc., but no dispute between the original defendants over the interpleaded fund.

At the conclusion of the case the court found against Marcus on almost all of his contentions and ordered that he be paid the impleaded fund and one other item which is of no significance for present purposes. Aggrieved at getting the fund, which the original complaint said he was claiming, rather than the different and antithetical relief he actually sought, Marcus has appealed, raising at the outset the question whether this is such a suit as should have been entertained under the Interpleader Act of 1936, as amended. 28 U. S. C. § 1335.

The Interpleader Act authorizes interpleader by an obligor where "two or more adverse claimants, of diverse citizenship . . . are claiming or may claim . . ." the impleaded fund or obligation. The district court viewed Marcus of New York and Milmar, Inc., of New Jersey to be actual or potential adverse claimants within the meaning of the statute. However, appellant Marcus urges that the plaintiff "did not in good faith fear claims of both defendants" and for that reason had no standing to invoke the equitable jurisdiction of interpleader.

It is well established that without real fear of the vexation and hazard of conflicting claims, an obligor cannot maintain interpleader. This remedy was developed by equity so that a stakeholder could avoid being subjected to such hazard and vexation. Thus, in the very nature of the problem it seeks to solve, the federal Interpleader Act requires "adverse claimants" who are claiming or may claim the same fund. Of course, only one claim will ultimately be sustained. Thus, jurisdiction in interpleader is not dependent upon the merits of the claims of the parties interpleaded, and a plaintiff can maintain the action even though he believes that one of the claims is valid and the other,

or others, without merit. See *John Hancock Mut. Life Ins. Co.* v. *Kraft*, 2d Cir. 1953, 200 F. 2d 952; *Hunter* v. *Federal Life Ins. Co.*, 8th Cir. 1940, 111 F. 2d 551; *Metropolitan Life Ins. Co.* v. *Segaritis*, E. D. Pa. 1937, 20 F. Supp. 739.

On the other hand, that which is advanced as an adverse claim "may be so wanting in substance that interpleader under the statute may not be justified". *New York Life Ins. Co.* v. *Lee*, 9th Cir. 1956, 232 F. 2d 811, 813. See also *John Hancock Mut. Life Ins. Co.* v. *Beardslee*, S. D. N. Y. 1920, 263 Fed. 909, 915. While the stakeholder is not obliged at his peril to determine which claimant has the better claim, he must have some real and reasonable fear of exposure to double liability or the vexation of conflicting claims to justify interpleader. See *John Hancock Mut. Life Ins. Co.* v. *Kraft*, 2d Cir. 1953, 220 F. 2d 952, 953-954. His bona fide purpose must be to rid himself of this vexation and the expense of resisting conflicting claims. See *Lockridge* v. *Brockman*, N. D. Ind. 1956, 137 F. Supp. 383. As Professor Chafee has put it, there must be in every interpleader a real fight over the res. Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 Harv. L. Rev. 929, 985 (1943). Several of the cases that plaintiffs have cited to us in their brief to show that claims need not be of prima facie validity point out this requirement of good faith. *Hunter* v. *Federal Life Ins. Co.*, 8th Cir. 1940, 111 F. 2d 551, 556; *First National Bank* v. *Fleming*, D. N. J. 1950, 10 F. R. D. 159, 160; *Massachusetts Mut. Life Ins. Co.* v. *Weinress*, N. D. Ill. 1942, 47 F. Supp. 627, 631. It follows that, where the plaintiff knows that he can safely pay one party without substantial risk of vexatious demand by a rival claimant interpleader will not lie.

In this case it is clear that the plaintiffs did not believe or assert in good faith that there was any danger of Milmar, Inc., claiming the unpaid purchase money. We say this because of a fact not heretofore mentioned in this opinion.

At the time Miller and Bierman filed their complaint expressing fear that Milmar, Inc. might claim the purchase price of the shares, they were the sole stockholders of Milmar, Inc., and in complete control of that corporation. Moreover, they knew as principals in the sale transaction that a procedure of canceling outstanding Milmar stock owned by Marcus and others and having Milmar, Inc. issue new stock to Miller and Bierman had been no more than the agreed mechanics of the transfer of stock from Marcus to them, which gave rise to the purchase money obligation they have sought to implead. Thus, when they impleaded Milmar, Inc. they knew that corporation had no claim on them for the purchase price and could not even assert a fictitious claim without their consent.

Unable to dispute these facts, appellees have sought to avoid them by an argument that is ingenious but not persuasive. In their brief they say: "The dangers envisaged arose from the possibility that [control of Milmar, Inc.] • • • might change hands through action of creditors, receivership • • •, and that the persons who might obtain future control in such manner might demand of Miller and Bierman that they make payment to *Milmar* of the purchase moneys under the September 1948 contract in accordance with its literal terms, i. e., Milmar having been named therein as the 'seller'."

We are unable to see how the plaintiffs could possibly have been apprehensive on this score. Of course they well knew that any such claim would be completely baseless. And being in control of Milmar, Inc. when this alleged danger occurred to them they could at anytime have Milmar, Inc. execute a formal document disavowing any interest in the payments and stating that Marcus was the sole party in interest on the selling side. Such a document would put any receiver on notice as to the true situation in regard to the stock transaction. Any investigation he might make would confirm this information, since one of the few points

of agreement by all who participated in this transaction was that Marcus was the seller, not Milmar, Inc. It is not to be presumed that a receiver, thus informed, would proceed in bad faith to harass Miller and Bierman demanding payment to Milmar, Inc. Moreover, as this court has recently pointed out, receivers "are officers of a responsible court which can be relied upon to see that * * * obviously proper action is taken," so that fear of groundless and improper conduct by receivers cannot amount to an "adverse claim" within the conception of the Interpleader Act. *B. J. Van Ingen and Co.* v. *Connolly*, 1955, 225 F. 2d 740, 742.

Actually, what has been done in this suit has been to misuse interpleader, based on mere pretense of adverse claims to a fund, to obtain adjudication of controversies other than entitlement to that fund. While "the normal duty of a district court [is] to permit interpleader liberally to relieve parties of the hazards and vexations of conflicting claims against them," *B. J. Van Ingen & Co.* v. *Connolly, supra,* at 744, the asserted hazards and vexations here were as unreal as the asserted depredations of the casual ejector in the classic common law action to try land titles.

The interpleader action should have been dismissed once its true character was disclosed, as presenting no bona fide issue of the type essential to this form of equitable relief, and therefore, constituting an imposition upon the jurisdiction of the court.

Accordingly, the judgment will be vacated and the cause remanded with instructions to dismiss the complaint as not being predicated upon any bona fide fear of vexatious conflicting claims.

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

4. Judgment of Court of Appeals (July 3, 1957) (R. Pr. Ct. App.).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,073

AL BIERMAN and WILLIAM MILLER

vs.

SAMUEL MARCUS and MILMAR ESTATE, INC., a corporation organized under the laws of New Jersey
SAMUEL MARCUS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, KALODNER and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded with instructions to dismiss the complaint.

Attest:

IDA O. CRESKOFF,
Clerk.

July 3, 1957.

Appendix B—Mandate of Court of Appeals.

5. Mandate of Court of Appeals (July 31, 1957) (R. Pr. Ct. App.).

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the District of New Jersey

—GREETING

WHEREAS, lately in the United States District Court for the District of New Jersey, before you or some of you, in a cause between Al Bierman and William Miller, Plaintiffs and Samuel Marcus and Milmar Estate, Inc., a corporation organized under the laws of the State of New Jersey, Defendants (District Court No. 1026-50 Civil Action) a judgment was entered on October 19, 1956 in favor of Plaintiffs and against Defendants,

as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Samuel Marcus agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came onto be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded with instructions to dismiss the complaint.

July 3, 1957.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 31st day of July in the year of our Lord one thousand nine hundred and fifty-seven.

IDA O. CRESKOFF,
Clerk, United States Court of
Appeals for the Third Circuit.

COSTS (to be recovered by Samuel Marcus, Appellant)

Clerk's Fee	$ 25.00
Printing Briefs and Appendices	8,062.25
Total	$8,087.25

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

6. Colloquy and Rulings, District Court proceedings on execution of Mandate (October 28, 1957) (R. Mot. Ct. App., Appendix, pp. A-7 to A-19).

IN THE

United States District Court

FOR THE DISTRICT OF NEW JERSEY.

AL BIERMAN, *et al.*,

vs.

SAMUEL MARCUS, *et al.*

Newark, N. J., October 28, 1957.

Civil 1026-50.

Motion.

Before:

HON. WILLIAM F. SMITH, *U. S. D. J.*

Mr. Shapira: Your Honor, I am appearing on behalf of Sam Marcus, who obtained a reversal of judgment entered by Judge Modarelli, and as I see the proceeding before your Honor it is as simple as merely filing——

The Court: You say he obtained it, that I have my doubts about. The circuit decided on the question which they raised themselves, jurisdiction, and they decided the court had no jurisdiction because it was not in truth and in fact an interpleader action. That put the thing right out of court lock, stock and barrel.

Mr. Shapira: That is all I am asking this court to do by submitting an order, putting it out of this court lock, stock and barrel.

There seems to be just one question, and that is the money which is now in the hands of a master under the order of this court.

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

If your Honor pleases, I think my order, which I have submitted to your Honor, indicates that the money had originally been taken from the registry of the Superior Court of New Jersey in order to put all parties back in status quo. It seems to me that the only logical thing to do would be to send it back.

The Court: Was this case removed from the Superior Court originally to this court?

Mr. Shapira: No, sir; the money was a result of a condemnation award, and that award was given during the pendency of this suit in the federal court and the commissioner, instead of paying over monies to the owner, or the record owner of the property, followed the statutory requirements and paid it into the Superior Court of New Jersey. Then this court, the federal court, ordered that the fund which was in the Superior Court be returned, or turned over to Mr. Winne as a master of this court. I say that in all justice and fairness it would seem to me that that money should now be turned to the Superior Court, or disposed of in such a manner as a court of competent jurisdiction would decree because, if your Honor pleases, the merits of the case have not been decided by the appeals court and there is no question that we will seek a decision on our claim.

The Court: Well, of course you see the state law, as does the federal law, provides that in a condemnation proceeding the court shall pay to the persons entitled thereto. In fact, I think that is even the language that is used; I had forgotten, it is so long.

Mr. Shapira: I have the statute here.

The Court: But I think contemplates that the money held in a condemnation proceeding, the value of the land taken having been fixed, shall remain in the court until the various persons prove their right to the fund.

Mr. Shapira: Anyone making a claim may petition.

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

The Court: There is no reason under the circumstances, in fact, I didn't handle this originally and if I had I would never have permitted it to be removed from the Superior Court because it should remain there. Now that we have no jurisdiction it should go back there.

Mr. Shapira: That is exactly my point, your Honor.

The Court: Until somebody decides who is entitled to it, because our circuit has said that we have no jurisdiction to decide it.

Mr. Shapira: Now, there is one other point that has been raised by Mr. Brigadier, who represents Milmar, and that is that he wishes to charge the fund with the tax costs. The tax costs that have been awarded to Mr. Marcus against not only Milmar but against other defendants, which would be tantamount to saying that we would pay ourselves if we eventually proved our case in the Superior Court, and I, if your Honor please, object to having Mr. Brigadier tell us where or against whom we should collect our costs.

Mr. Brigadier: If your Honor please, it is obvious that I am not going to stand up here this morning and say to Your Honor that you should not enter a judgment in accordance with the mandate.

The Court: I should not?

Mr. Brigadier: It is obvious that I would not suggest to your Honor anything like that even remotely.

The Court: That is the only judgment I can enter.

Mr. Brigadier: But I submit that the judgment you are being asked to enter is not in accordance with the mandate at all, or the opinion. Both the opinion and the mandate distinctly state that your Honor shall do the following:

"It is ordered and adjudged by the court that the judgment of the district court in this case be and the same is hereby vacated with costs, and the cause remanded with instructions to dismiss the complaint."

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

The proposed judgment that is being submitted to you today asks you to do a great deal more; it asks you not only to vacate the judgment and dismiss the complaint but also asks you to dismiss the cross claim of the defendant Milmar Estate, Inc., the cross claim of the defendant Samuel Marcus, the counter-claim of the defendant Samuel Marcus, the counter-claims of the plaintiffs Al Bierman and William Miller and the cross claim of the defendant Al Kevelson. All of which, incidentally, were adjudged and determined by the final judgment of Judge Modarelli, and which you are directed by the court of appeals to vacate.

But nowhere in the opinion or in the judgment are you told to dismiss these for a very good reason. The reason is that independent jurisdiction exists with respect to all of these claims, and that is why the court of appeals was very careful that it has employed.

When the appellate court intends that everything shall be dismissed, it says so.

The Court: All right. If that is the position you take, then there is only one thing to do: you may petition the court of appeals for a clarification of the opinion and the mandate, and you will do that at my direction because——

Mr. Brigadier: I cannot do that, sir, because I am troubled about one thing.

The Court: I am troubled about it because I know nothing about the litigation and I think when it says vacate it means vacate everything. Now, if there is any argument about it, then they ought to clarify the situation and the thing should remain in status quo until you have applied for such a clarification.

Mr. Brigadier: May I point out what I think my problem is, and you may be of even greater value.

We ran across authority in this very circuit in which the court of appeals made this very statement, "but in the opinion said it should be done before the term has expired," I think is the language the court used.

We were unable, unfortunately, to do anything, all of us in this case, because of the intervening death of Judge Modarelli. And this is actually the first time we are able to come before you and tell you what the problem is. We wondered whether under those circumstances, even though that language appears in this case, and we apparently are past that term in which this has happened, whether or not in view of the special circumstances, perhaps the court of appeals would consider it.

The Court: Well, don't you think under the circumstances since there is a disagreement as to what that means that you ought to go to the court that wrote it? Because I am a third party in it.

Mr. Brigadier: I would very much like to go, sir; the only problem is whether or not we have to go that way or whether we must do it the other way.

The Court: If they won't take you then I will have to take you and work it out. But I would like to know what they meant. You say there is this difference. After all, you gentlemen went through this litigation, I wasn't through it; Judge Modarelli was through it and the circuit has been through it.

Now, if there is some dispute as to what this mandate really means because it is "open and vacate," I don't think anything remains here. I don't think you retain a cross claim when the claim itself fails.

Mr. Brigadier: We found ample authority to the contrary and we are ready to brief it. That is another problem that confronts me. You see we got this motion accompanied with a letter to appear, that he is submitting no

brief because he is doing nothing but asking the court to implement the mandate. Well, actually when I read this proposed decree for judgment, that he is going way beyond the terms of the mandate, it seems to me that this is something that should have been supported by a brief. We found a great deal of authority, sir, on this question.

The Court: I am a stranger and I have no briefs on this at all, which puts me in a very strange position because I have no knowledge of what took place at all, and I understand that this took some weeks before Judge Modarelli.

Mr. Brigadier: Nineteen days of actual trial.

The Court: In fact, his secretary brought over to me the record and it stands that high (indicating).

Now, with all the competent counsel in here and that have been with this for all these weeks, it occurs to me that you ought to work out a proper judgment, yourselves, or if there is some dispute as to what the circuit contemplated when it says "open and vacate," now you said it didn't contemplate the cross claims.

Mr. Brigadier: Or the counter-claim.

The Court: Or the counter-claim.

Mr. Brigadier: And it distinctly says "vacate the judgment and dismiss the complaint."

The Court: All right.

Mr. Brigadier: When we checked the reported cases we found——

The Court: All right, if they have reserved any portion of this litigation in a jurisdictional status in this court, then somebody ought to say it and you ought to go back there.

Mr. Brigadier: All right, I will be very glad to do so.

The Court: All right. Now, what I will do, I will adjourn your motion without day, the present three applications without day and give you an opportunity to go there. And I think that is where you all ought to go.

Of course, if they don't hear you, why then you will have to come back and we will have to work it out the best way we can.

Mr. Shapira: If I may be heard on that.

The Court: Yes.

Mr. Shapira: It seems to me that if Mr. Brigadier objects to that one clause I would be willing to eliminate it from the order.

The Court: He makes another point, though, he makes another point important to the court: that there remains for determination in this court——

Mr. Shapira: Yes, I understand that, sir. Except this: that we shall go as far as we know we ought to in any event. In other words, the judgment should be vacated because we want to proceed in the state court. This delay which will be occasioned by reason of your Honor's suggestion may work to our hardship. It seems to me that an order should be entered now in accordance with the mandate, vacating this judgment.

As far as anything else is concerned, if we just stick to the four corners of the judgment and the mandate, I will be very happy because we can proceed in the state court, where we can't do it now because under the order of this court we have been enjoined from instituting any action. And this is the thing that I want to avoid, is further delay.

Now, if Mr. Brigadier is unhappy or dissatisfied with the way the opinion is written and he can't understand it, then he certainly should take proceedings, but it should not prevent us from proceeding elsewhere.

The Court: Well, then, you are going to be in a very anomalous position because you will have the counterclaims and cross-claims in this court and the original litigation in another court, won't you?

Mr. Shapira: Is it your Honor's opinion that there is any question about the fact that the court refused to litigate these various claims and cross-claims and ordered the vacation of those cross-claims and counter-claims because they didn't decide a single thing other than the fact that the suit should be dismissed?

The Court: No, Counselor, I entertain no thought about it one way or the other.

Mr. Shapira: Yes. As a matter of fact, in the opinion—

The Court: Your adversary raises a question and I said if there is a question—I don't know whether or not there is——

Mr. Shapira: Well, the opinion says—may I interrupt your Honor?

The Court: Go ahead.

Mr. Shapira: The opinion distinctly says—I haven't been able to just hit it, but I will, with your Honor's indulgence.

Mr. Brigadier: The last paragraph.

Mr. Shapira: No, it is not the last paragraph. That there was no necessity for determining any of the other claims because the suit falls due to the bad faith in the filing of the interpleader. Which merely means that the court has stated that since the complaint is to be dismissed nothing else is before the court to decide. And this is the tenor of the opinion.

The Court: All right.

Mr. Shapira: Now, it doesn't seem fair to again litigate this before the court of appeals with the statement——

The Court: Yes, but, Counselor——

Mr. Shapira: Yes.

The Court: A question is raised and I say if there is a question it should be decided by the circuit, no by me. He raises a question, and if he wants it clarified I am perfectly

willing to give him an opportunity to do it. Now, how long are you going to be delayed?

Mr. Shapira: The fact of the matter is, if your Honor please, there is a mandate to this court to do something. It would seem to me that you should do that, and if he has any other remedy he should pursue it in another direction. But I don't think we should be delayed in the entry of the order in accordance with the mandate. It is as simple as that.

Mr. Brigadier: If your Honor please, so that Mr. Shapira will have no misapprehension about what I am doing, I am doing much more than he even imagines, apparently, I am saying that the court of appeals has merely directed that the judgment as it was rendered by Judge Modarelli be vacated; that the complaint be dismissed, and then under the language of the mandate, as it appears in all mandates, that such proceedings be had in such cause in conformity with the opinion and the judgment of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

The Court: Yes.

Mr. Brigadier: And my contention is this: That thereupon I am going to ask you, after you vacate this judgment and enter an order dismissing the complaint, that you then find as a matter of law that the cross-claims and counter-claims stand by reason of independent jurisdiction; that they have already been adjudicated and that therefore you enter a new judgment only on the portion of the cases as to which this court has jurisdiction, the counter-claims and the cross-claims, and that the only question you will be called upon to decide with respect to that judgment is whether the dismissal of the interpleader in any way affects or changes the adjudication as it was made by Judge Modarelli on those counter-claims.

The Court: All right. Now, you may have another situation, now you present even another question of law. Maybe a petition for rehearing is the appropriate thing before the circuit because the circuit hasn't ruled on these other claims, apparently.

Mr. Brigadier: Has not.

The Court: It has neither reversed nor sustained them.

Mr. Brigadier: Let me show you what they did. They raised seven points on the appeal with subdivisions of many of the seven points. The court of appeals didn't get beyond point 1-A, didn't even reach point B on the question of jurisdiction. So that is my contention.

Now, I think there are two ways to handle it. I would rather handle it the way your Honor suggested, that is first go back to the court of appeals.

The Court: I will be guessing at it, I will be guessing at it.

Mr. Brigadier: That is right. That is why I think that is better to do.

The Court: They will be deciding. I don't want to guess it because here is the situation, gentlemen: You have already gone through sixteen weeks or so of litigation, this suit is already complicated. Now, if we are going to start complicating it further, just as soon as Mr. Shapira starts his new suit if the funds are sent back to the Superior Court, we are going to be down here with the counter-claims. I don't know what you are going to do with them here—or the cross-claims—because, as you say, you argue that way, that they remain undisturbed by the opinion of the circuit.

I want to know from the circuit whether or not they meant to disturb the adjudication on the counter-claims and cross-claims because I don't know. As I said, it comes to me because Judge Modarelli is dead.

Now, I don't see what great delay you have or how anybody is going to be prejudiced because the fund is apparently still intact somewhere, and I don't know why somebody didn't think of this sooner.

Mr. Brigadier: Sir, we did think of it but we had other problems, procedural problems we didn't know what to do with. As soon as we read the opinion, before the mandate came down, we saw this point.

The Court: I read the opinion but I couldn't appreciate until you brought it to my attention, the problem about the cross-claims and the counter-claims, and there is a problem, I agree with you. If possible I am going to give the circuit the opportunity to say more completely what they meant. Maybe they would care to amend the mandate consistent with Mr. Shapira's contention. Maybe they would want to amend it consistent with the position you take, I don't know.

Mr. Shapira: I just want to add this, sir: if they would do that, do what he wants them to do, we would have been able to do what we wanted to do in the first place, we would have been able to petition the United States Supreme Court for certiorari; we didn't because we couldn't tell from the mandate that they had done this, you see, and we know that the Supreme Court in granting certiorari is not going out of its way.

The Court: You wanted to hold on to your adjudication on the counter-claim and cross-claims as a valid judgment of the court.

Mr. Brigadier: That is exactly what our intention is.

The Court: All right. That is the reason why you ought to go there and find out, and not from me because I don't know. I have read the opinion and until you bring this to my attention this morning, I don't know what the situation is.

* * * * * *

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

Mr. Shapira: Your Honor, this is not at your direction.

The Court: No, all I am doing is adjourning it to afford him an opportunity to take such action as he deems advisable. Now, as soon as the circuit acts on it one way or the other if you will inform me we will fix it for immediate hearing.

Mr. Shapira: I certainly want it to appear that your Honor directed either one of us to take the appeal to the circuit.

The Court: I am not directing it, I am just saying that Mr. Brigadier raises a question and I am suggesting to you that maybe the circuit should clarify it because if it does leave the status of the claims and the counter-claims undisposed of, then I don't know what action this court is to take with reference to them.

Now, otherwise, in view of Mr. Brigadier's argument, he wants to hold on to the judgment and in addition to the mandate I suppose he submits an order for judgment which will preserve the status of those claims and counter-claims which will affect your litigation in the state court immediately.

Mr. Shapira: If your Honor pleases, all of that has been argued before the circuit court, they heard all of the issues involved and this happened to be——

The Court: That is the reason.

Mr. Shapira: —happened to be an order dismissing everything. It seems to me they disposed of every part of the case.

The Court: It seems to me they may have, Counselor.

Mr. Brigadier: That is what we are going to find out.

The Court: And that is what you are going to find out. Now, I have read the opinion and I must say I did not know anything about these counter-claims or cross-claims. I don't know. Frankly I don't know.

Now, they do say that the thing is to be dismissed. My view of it would be that the whole litigation is dismissed. Mr. Brigadier's view is otherwise, and I will let him go there, I will give him a chance to do it.

Mr. Shapira: You are giving him an opportunity without direction.

The Court: An opportunity to do it.

Mr. Shapira: In other words, I don't want him to appear before the circuit and say that, "the court below directed me to do this."

The Court: No, I am adjourning it to give him an opportunity to do what he wants me to do here. Now, I don't know.

Mr. Shapira: Very good.

The Court: That is all, and I suggest if any action is to be taken it be taken forthwith so there won't be any undue delay.

Mr. Brigadier: If your Honor please, I have enough confidence in my argument here not to have to lean on you, so let him not be worried that I am going down there to say you sent me; I am going there for the reasons I stated to you this morning.

The Court: Well, you said you had the idea earlier but because of——

Mr. Brigadier: Unfortunately this situation arose and we didn't know what to do about it.

The Court: You didn't know what to do about it. Well, all right, go ahead.

7. Order of Court of Appeals (December 26, 1957) (R. Pr. Ct. App.).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,073.

AL BIERMAN AND WILLIAM MILLER

v.

SAMUEL MARCUS AND MILMAR ESTATE, INC., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY

SAMUEL MARCUS,

Appellant.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

ORDER DENYING MOTION FOR RECALLING AND AMENDING OF MANDATE.

Upon consideration of the motion of appellees herein for an order amending and recalling this court's mandate of July 31, 1957; and

It still appearing to the satisfaction of this court that an interpleader complaint, the essential averments of which constituted an imposition upon the jurisdiction of the District Court, was the basis upon which that court took cognizance of and adjudicated the several matters covered by its final judgment from which appeal was taken to this court; it is hereby

Appendix B—Order of Court of Appeals.

ORDERED that the said motion be and it is hereby denied.

By the Court:

(Sgd.) WILLIAM H. HASTIE,
Circuit Judge.

Dated: December 26, 1957.

RECEIVED & FILED,
Dec. 26, 1957.

IDA O. CRESKOFF,
Clerk.